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In The Supreme Court of the United States

TROY CAB, INC., DEECO SERVICES, INC., d/b/a DEECO TRANSPORTATION, FRANK TIBERIO, d/b/a FAIRFIELD TOWING, LAFOND EXPRESS, INC., CALCUT SALES & SERVICES, INC., d/b/a CALCUT TRUCKING COMPANY, MID-CON FREIGHT SYSTEMS, INC., H & H ENTERPRISES, INC., d/b/a S & M CARTAGE, INC., ECONOMY TRANSPORT, INC., MASON & DIXON LINES, INC., ROMEO EXPEDITORS, INC., WESTLAKE TRANSPORTATION, INC., VANDERKOOI CARRIERS, INC., GERRIG'S TRUCKING & LEASING, INC. and BESTWAY EXPRESS, INC., individually and on behalf of all others similarly situated,

Petitioners,

v.

MICHIGAN PUBLIC SERVICE COMMISSION, MICHIGAN DEPARTMENT OF TREASURY, MICHIGAN DEPARTMENT OF COMMERCE, AND THE STATE OF MICHIGAN,

Respondents.

On Petition For A Writ Of Certiorari To The Michigan Court Of Appeals

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

May Michigan continue to assess an annual $100 per-powered-vehicle regulatory fee, on intrastate motor carriers, when the purposes and provisions of its underlying economic regulatory act were preempted by Congress in 1995?

LIST OF PARTIES

Additional parties to the proceedings below were as follows: (a) As plaintiffs, Prism, Inc.; El Toro, Inc.; Myriah, Inc.; Dale Constine & Sons, Inc.; Ambassador Transportation, Inc.; Hawkins Steel Cartage, Inc.; JLH Transfer, Inc.; Central Transport, Inc.; Bancroft Trucking Co.; U.S. Truck Co., Inc.; West End Cartage, Inc.; Central Cartage Co.; CTX, Inc.; Mohawk Motor of Michigan, Inc.; McKinlay Transport, Ltd.; Universal Am-Can, Ltd.; Tom Thumb Services, Inc., d/b/a REI; O-J Transport Company; J. Law Enterprises, Inc.; and Alliance of O-J Transport, Inc.; (b) as intervening plaintiffs, The American Trucking Associations, Inc. and TNT Holland Motor Express, Inc.; and (b) as defendants, the Commissioners and Chairman of the Michigan Public Service Commission; the Treasurer of the State of Michigan; and the Director of the Michigan Department of Commerce.

RULE 29.6 STATEMENT

Petitioners, Troy Cab, Inc., Deeco Services, Inc., d/b/a Deeco Transportation, Frank Tiberio, d/b/a Fairfield Towing, Lafond Express, Inc., Calcut Sales & Services, Inc., d/b/a Calcut Trucking Company, Mid-Con Freight Systems, Inc., H & H Enterprises, Inc., d/b/a S & M Cartage, Inc., Romeo Expeditors, Inc., Westlake Transportation, Inc., VanDerKooi Carriers, Inc., Gerrig's Trucking & Leasing, Inc. and Bestway Express, Inc. have no parent companies and are not owned in any respect by any publicly-held entity. Petitioners, Economy Transport, Inc., and Mason & Dixon Lines, Inc. are subsidiaries of Universal Truckload Services, Inc., and are not owned in any respect by any publicly-held entity.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners, Troy Cab, Inc., Deeco Services, Inc., d/b/a Deeco Transportation, Frank Tiberio, d/b/a Fairfield Towing, Lafond Express, Inc., Calcut Sales & Services, Inc., d/b/a Calcut Trucking Company, Mid-Con Freight Systems, Inc., H & H Enterprises, Inc., d/b/a S & M Cartage, Inc., Economy Transport, Inc., Mason & Dixon Lines, Inc., Romeo Expeditors, Inc., Westlake Transportation, Inc., VanDerKooi Carriers, Inc., Gerrig's Trucking & Leasing, Inc. and Bestway Express, Inc. respectfully petition for a writ of certiorari to review a judgment of the Michigan Court of Appeals.

OPINIONS BELOW

The opinion of the Michigan Court of Appeals (App. 1-35) is reported as *Westlake Transportation, Inc. v. Michigan Public Service Comm'n*, 255 Mich.App. 589, 662 N.W.2d 784 (2003). The trial court rulings (App. 36-72) and the judgment of the Michigan Supreme Court denying leave to appeal (App. 73-75) are all unreported.

JURISDICTION

The Michigan Court of Appeals decision was entered on March 11, 2003. The judgment of the Michigan Supreme Court denying Petitioners' timely Application for Leave to Appeal was entered December 3, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Supremacy and Commerce Clauses of the United States Constitution, Art. VI, cl. 2 and Art. I, § 8, cl. 3, provide in relevant part as follows:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.
>
> * * *
>
> The Congress shall have Power . . . [t]o regulate Commerce . . . among the several States. . . .

STATEMENT OF THE CASE

On August 23, 1994, President Bill Clinton signed into law the Federal Aviation Administration Authorization Act of 1994 (F4A), Pub. L. No. 103-305, Title VI, 108 Stat. 1604,[1] Section 601 of which preempted state regulation of "price, route, or service" of intrastate motor carriers, with the sole exception of household goods carriers. All of the Petitioners (with the exception of two, which later obtained intrastate authority) conducted operations in

[1] This section was amended and recodified in part, at 49 U.S.C. § 14501, by the I.C.C. Termination Act of 1995, Pub. L. No. 104-88 (December 29, 1995). It formerly appeared at 49 U.S.C. § 11501(h). See, also, 49 U.S.C. § 41713(b)(4), for the corresponding "air carrier affiliates" preemption language of Section 601.

Michigan intrastate commerce at the time of the preemption, and were regulated economically with the Michigan Public Service Commission (MPSC). On January 3, 1995, the first business day following the law's effective date, the Petitioners, on behalf of themselves and as class representatives for other Michigan intrastate carriers similarly situated, commenced a class action in the Michigan Court of Claims, challenging the continued imposition of intrastate economic regulatory fees assessed on them at the rate of $100 per vehicle per year through the operation of MCL 478.2(1). According to the Act's own terms, these fees were "assessed against and collected from each motor carrier for the administration of this act," the provisions of which had been declared preempted by operation of federal law. A second class action was commenced on January 9, 1995, also challenging the imposition of the intrastate fees.[2] The two actions were consolidated and the classes certified by the Michigan Court of Claims.

At the time of the federal preemption, 41 jurisdictions, including Michigan, regulated intrastate prices, routes, and services of motor carriers, according to the House Conference Report No. 103-677, August 5, 1994 regarding the F4A. (App. 88). The Conference Report accompanying the preemption provision of the F4A discussed existing state regulation:

> Typical forms of regulation include entry controls, tariff filing and price regulation, and

[2] The class actions also challenged the imposition of certain other fees imposed by the Michigan Motor Carrier Act including an interstate fee mandated by MCL 478.2(2). This petition involves *only* the issue of the intrastate fee.

> types of commodities carried. Not all 41 States regulate each of these aspects nor do they all regulate them in the same manner or to the same degree.
>
> Entry controls at the State level vary from liberal to strict. Strict entry controls often serve to protect carriers, while restricting new applicants from directly competing for any given route and type of trucking business. About 26 States strictly regulate trucking prices. Such regulation is usually designed to insure not that prices are kept low, but that they are kept high enough to cover all costs and are not so low as to be 'predatory'. Price regulation also involves filing of tariffs and long intervals for approval to change prices. A company which wants to change its prices often must go through a costly and lengthy hearing proceeding in each State in which it operates.

Id. The conferees pointed out the differing level of regulation for air carriers also conducting motor carrier operations, which had been found exempt from intrastate motor carrier regulation in *Federal Express Corporation v. California Public Utilities Commission*, 936 F.2d 1075 (9th Cir. 1991), *cert. denied*, 504 U.S. 979, 112 S.Ct. 2956, 119 L.Ed.2d 578 (1992). *Id.* (App. 89). Congress wanted to end the competitive disadvantage which ground carriers competing with air carriers still faced, because of intrastate economic regulation. *Id.* (App. 81, 89).

Thus, Congress, in enacting the F4A preemption, desired to extend to all motor carriers the deregulatory approach which had been effected by the Airline Deregulation Act (ADA) of 1978, Pub. L. No. 95-405, 92 Stat. 1707

(1978). *Id.* (App. 81). Continuing with their statement of purpose, the conferees explained:

> Despite the movement toward deregulation by some individual states, the conferees believe preemption legislation is in the public interest as well as necessary to facilitate interstate commerce. State economic regulation of motor carrier operations causes significant inefficiencies, increased costs, reduction of competition, inhibition of innovation and technology and curtails the expansion of markets.

House Conference Report at p. 87. (App. 90).

In the preemption of laws "related to price, route, or service of any motor carrier", the conferees were careful to note the wide swath of the preemptive statute. They underscored that:

> In substituting the word 'related' for the prior word 'relating' and the word 'price' for the word 'rates' we are intending no substantive change to the previously enacted preemption provision in Section 105 of the Federal Aviation Act and do not intend to impair the applicability of prior judicial case law interpreting these provisions. In particular, the conferees do not intend to alter the broad preemption interpretation adopted by the United States Supreme Court in *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 112 S.Ct. 2031, 119 L.Ed.2d 157 (1992).

Id. (App. 81). The Act itself left a few areas untouched by the preemption including certain specified "safety

regulatory authority" over vehicles, 49 U.S.C. § 14501(c)(2)(A); the transportation of household goods,[3] 49 U.S.C. § 14501(c)(2)(B); so-called non-consensual towing operations, 49 U.S.C. § 14501(c)(2)(C); and certain articulated state standard transportation practices concerning uniform cargo liability rules, uniform bills of lading, uniform cargo credit rules, and antitrust immunity for joint line rates or for household goods agent van line operations, 49 U.S.C. § 14501(c)(3)(A)(i)-(v). (App. 76-77). With regard to this residue of state regulatory authority, the conferees issued a cautionary statement:

> The conferees do not intend the regulatory authority which the States may continue to exercise . . . to be used as a guise for continued economic regulation as it relates to prices, routes or services.

Conference Report at p. 84. (App. 83).

According to the statute itself, with respect to safety, the preemptive effect:

> . . . shall not restrict the safety regulatory authority of a State with respect to *motor vehicles*, the authority of a State to impose highway route controls or limitations based on the size or weight of the *motor vehicle* or the hazardous nature of the cargo, or the authority of a State to regulate *motor carriers* with regard to minimum amounts of financial responsibility relating to

[3] This class action does not involve in any respect carriers of household goods, still economically regulated by Michigan, and exempted by the preemption.

> insurance requirements and self-insurance authorization . . .

49 U.S.C. § 14501(c)(2)(A). (App. 76). (Emphasis supplied). Significantly, the authority of a state to regulate motor carriers themselves was only mentioned in the statute "with regard to minimum amounts of financial responsibility relating to insurance requirements and self-insurance authorization." There was safety regulatory authority conferred on the states with respect to "*motor vehicles*," not "*motor carriers*". The MPSC assesses the intrastate regulatory fee only on regulated intrastate carriers, albeit on a per-vehicle basis, not on commercial motor vehicles generally. The MMCA says the $100 is *a fee*, not a tax, at MCL 478.2(1). (App. 103).

The fee structure is part of the strict regulatory regime of the Michigan Motor Carrier Act (MMCA), passed in 1933. The word "safety" does appear once in the Act's title. However, the Act regulated only "carriers of property for hire" in its title. (See App. 93).[4] The MMCA's title indicates the legislation is "to preserve, foster, and regulate transportation and permit the coordination of motor vehicle transportation facilities." The law is designed "to classify and regulate carriers of property by motor vehicles for hire upon such public highways for such purposes . . . " *Id.* It is structured:

> . . . to insure adequate transportation service; to give the commission jurisdiction and authority to

[4] At the time of the Act's passage, it regulated both motor carriers of property and passengers. Passenger regulation was transferred to another state agency in 1982.

> fix, alter, regulate, and determine rates, fares, charges, classifications, and practices of common motor carriers for such purposes; to require filing with the commission of rates, fares, and charges of contract carriers and to authorize the commission to prescribe minimum rates, fares, and charges . . .

Id.

The Michigan Legislature declared its purpose in enacting the MMCA at MCL 475.2 (App. 94). Again, the word "safety" is mentioned at MCL 475.2(b), in only one of 14 enumerated purposes. Those other purposes include such economic regulatory designs as the promotion of "efficient transportation services," the meeting of the needs of "shippers, receivers, and consumers," the allowance of "a variety of quality, price, and service options," the allowance of "the most productive use of equipment," the provision "for efficient and well-managed motor carriers to earn adequate profits," the promotion of "intermodal transportation," the prevention of "unjust discrimination," the maintenance of "service to small communities and small shippers," the promotion of "entrepreneurship in the motor carrier industry by allowing greater contract carrier economic and entry flexibility," and the promotion of "jointly considered and initiated rates." See MCL 475.2(c), (d), (e), (f), (g), (h), (i), (k), (m), and (n). These purposes all had as their root the regulation of price, route, and service of the motor carrier industry. Even that one mention of safety is limited to for-hire carriers only, thus excluding from the scope of MPSC regulation all private fleets which carry their own goods. Numerous other classes of vehicles are exempted from the Act as delineated at MCL 479.2, including transporters of logs, raw milk, agricultural

products, disabled motor vehicles from the location of an accident, recyclable materials, fertilizers, and certain sand and gravel shipments. Similarly, local transportation, defined as operations within eight miles of the boundary of a city or village, was deregulated for all but the City of Detroit. The "safety" concerns of the Legislature did not extend to such operations, because the focus of the Legislature was on economic regulation.

The Michigan Legislature established an elaborate process for motor carriers to obtain required certificates as a common carrier at MCL 476.5 (App. 95). Existing carriers were allowed to "protest" an application and demonstrate that "the service proposed will create excess service inconsistent with the public interest." *Id.* Again, the word "safety" is found at MCL 476.5(1)(a), as a small component of a complicated application process. An important "required" public purpose component was in the MMCA which had to be demonstrated through the presentation of evidence by supporting shippers that additional motor carrier service was required. See MCL 476.5(1)(c) (App. 95). It was mandated that the Commission consider not only the transportation policy, but also:

> Whether the service proposed will create excess service inconsistent with the public interest. The commission shall not find diversion of revenue or traffic from an existing motor carrier to be in and of itself inconsistent with the public interest.

MCL 476.5(2)(c) (App. 96). Certificates of authority granted to common carriers were even divided into three separate classes. MCL 476.5(6). (App. 97). Those classes included those carriers operating over fixed routes, those carriers operating within an eight-mile radius of a city

having a population of 500,000 or more (Detroit), and certificates issued to all other motor common carriers. *Id.*

Common carriers holding authority were required to keep tariffs on file. The MMCA prohibited predatory rates. Joint rates over through routes were authorized for carriers. MCL 476.6 (App. 98). All common carrier rates were required to be "just and reasonable". MCL 476.7 (App. 99). Rates could not "be unjustly discriminatory, prejudicial, or preferential." *Id.* In making a determination as to whether rates were just and reasonable, the MMCA directed:

> The commission shall take into account reasonable estimated or foreseeable future costs in determining whether rates, fares, and charges meet the requirements of this subsection.

Id. Finally, carriers were required to charge the rates contained in their tariffs filed with the MPSC. MCL 476.7(2) (App. 99). Refunds or remittances from those rates were prohibited. MCL 476.7(3) (App. 99-100).

Contract carriers were distinguished from common carriers. These carriers had a similar labyrinth of regulations to negotiate. Again, contract carrier applications were required to have shipper support. The Commission again looked at the transportation policy at MCL 477.2 (App. 100). The Commission was also required to look at whether the proposed operation of the contract carrier "strictly conform[ed] with the definition of a motor contract carrier." MCL 477.2(1)(a) (App. 100). Safety was only a minor component of that entire process.

Once a contract carrier had received authority, it also was required to file its rates with the Commission. MCL 477.6 (App. 101). Contract carriers were also required to

make "available to the commission its complete contract or contracts." MCL 477.6(2) (App. 101-102). The MMCA directed the Commission to "promulgate rules covering the filing with the commission of the charges, and the operations of motor contract carriers in competition with motor common carriers over the highways of this state." MCL 477.6(1). (App. 101). The MPSC was again required in the case of contract carrier rates to ensure that such rate filings were not "predatory." MCL 477.6(2) (App. 102). The MPSC was even given the power in the MMCA to establish "a prescribed minimum rate" for contract carriers. MCL 479.6(2)(b) (App. 102).

For the administration of this complex economic regulatory act, carriers were assessed the annual intrastate fee challenged here of $100 for each self-propelled motor vehicle. MCL 478.2(1). (App. 103). The fee of $100 per power unit added up to substantial sums in the operation of larger carriers. In the case of United Parcel Service, Inc., those amount to well over $100,000 per year. It is termed a fee, not a tax. *Id.* The Court of Claims was presented with uncontroverted evidence that those carriers affiliated with class representative Economy Transport, Inc. had expended over $50,000 per year from 1982 through 1994, the year prior to the F4A's effective date. A Michigan Senate agency report presented to the Court of Claims revealed that, for the state fiscal years from 1982-1983 through 1994-1995, the MMCA had generated fee revenues of $63,861,600.

A separate agency, the Motor Carrier Division of the Michigan State Police, is charged with the responsibility for safety regulation of commercial motor vehicles on Michigan highways. That division of the State Police administers an entirely separate law, the Motor Carrier

Safety Act of 1963, MCL 480.11(a), *et seq*. Its jurisdiction extends not just to intrastate for-hire trucking companies, but to all commercial motor vehicles on the roads in Michigan, as well as their operators. The Michigan Department of Commerce, the department of which the Michigan Public Service Commission was then a part, commissioned its own study in November of 1992, entitled *Truck Safety and Economic Regulation of the Trucking Industry* by Britany Orlebeke. This report noted that:

> MPSC regulates only segments of the for-hire transportation of property within the state. There are numerous exemptions to economic regulation, none of which are motivated by safety concerns.

Orlebeke, *supra*, at p. 32. On the other hand, the State Police regulated "*all* commercial vehicles." *Id.* (Emphasis in original). The report further noted that:

> Most of the [MPSC] Motor Carrier Regulation Division's energy is spent supporting economic regulation and its contributions to safety we have already discussed.

Id. That study concluded that economic regulation contributed only marginally to motor carrier safety, by promoting an ethical atmosphere which was not "the most effective nor the most efficient way to ensure that truck companies operate safely." Orlebeke, *supra*, Executive Summary. The Orlebeke report was part of the record before the Court of Claims.

On January 11, 1995, days after the commencement of these consolidated class actions, the MPSC issued an order in a contested case proceeding initiated *sua sponte* by the Commission that "it continues to possess substantial

regulatory authority over intrastate motor carriage . . . " (*In the Matter of Contested Case Proceedings for an Order regarding the Michigan Motor Carrier Act, Federal Preemption, and Continuing Jurisdiction of the Commission*, T-1273 at p. 24). This administrative proceeding had been commenced on September 8, 1994, and consisted of two days of administrative hearings on October 31 and November 1, 1994, as well as briefing by the parties. The January 11 order of the Commission accepted its staff's own conclusions on every issue on which the MPSC made a determination in that first holding, including the issue of the continued validity of the intrastate fee involved here.[5] The MPSC rushed to judgment, then, in order to preserve its fee structure and continued regulatory power. An appeal of that administrative agency decision is governed by Michigan statute, with:

> . . . appellant's burden to show by clear and satisfactory evidence that the order of the PSC complained of is unlawful or unreasonable. . . . This Court gives due deference to the PSC's administrative expertise and will not substitute its judgment for that of the PSC, particularly in legislative matters such as setting rates.

In Re Federal Preemption of Provisions of the Motor Carrier Act, 223 Mich.App. 288, 295, 566 N.W.2d 299 (1997); *lv. denied*, 458 Mich. 852, 587 N.W.2d 632 (1998); *cert. denied*, 525 U.S. 1018, 119 S.Ct. 544, 142 L.Ed.2d

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[5] The Commission did hold open for decision two issues on which it indicated that additional testimony was required – collective rate making and the MMCA leasing provisions, and ultimately differed from staff in its decision regarding preemption on those two issues in a decision issued on May 18, 1995, not involved here.

452. In their complaint in the Court of Claims, Petitioners had sought an impartial interpretation as to the continued propriety of the intrastate fee, in the wake of the federal preemption of economic regulation. A motion for summary disposition was filed by Petitioners in the summer of 1995, with oral argument on those motions taking place on September 28, 1995. Later that fall, defendants filed a motion for summary disposition, with oral arguments heard on November 16, 1995. The Court of Claims subsequently issued an order dated November 12, 1998 (App. 51-53), based on its written opinion dated October 13, 1998 (App. 36-50), denying plaintiffs' motion for summary disposition on the intrastate claim.[6] Then, on December 30, 1998, the Court of Claims issued an order granting defendants' motion for summary disposition (App. 54-56), to which plaintiffs filed a motion for reconsideration on January 13, 1999. That motion was denied by the Court of Claims on March 7, 2000. (App. 57-72).

Thereafter, the Michigan Court of Appeals affirmed the Court of Claims decision in *Westlake Transportation, Inc. v. Michigan Public Service Comm'n*, 255 Mich.App. 589, 662 N.W.2d 784 (2003), *appeal denied*, 673 N.W.2d 752. (App. 1-36). The Court of Appeals relied upon its earlier affirmance of the MPSC decision *In Re Federal Preemption* in affirming, as had the Court of Claims

[6] The Court of Claims also denied the motion for summary disposition on the interstate decal fee, not the subject of this petition, at the same time.

below.[7] The Michigan Supreme Court denied leave to appeal (App. 74-76).

The Court of Appeals and the Court of Claims simply ignored the Congressional history of the F4A preemption, in rejecting Petitioners' claims. This is an instance where a state has ignored the plain effect of federal preemption legislation in order to protect its revenue sources.

Michigan, along with one other state, West Virginia, continues to assess a regulatory fee of anywhere near this magnitude (App. 105-110, presented to the Court of Claims). Only two other states, Ohio and Idaho, charge a per vehicle fee for intrastate carriers which exceeds the $10 per vehicle maximum contained at 49 U.S.C. § 14504 for registration of interstate carriers[8]. Again, the only direct safety regulatory authority left to the states by Section 601 over motor carriers is insurance filings, the same function for interstate carriers which leads to a $10 maximum per vehicle fee. The Michigan intrastate regulatory fee, then, of $100 per vehicle per year assessed against intrastate motor carriers represents the same kind

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[7] Discovery had not closed in the Court of Claims when the tribunal issued its summary disposition order. In fact, the court had ordered that discovery was not to close until six months after its summary disposition order was to be handed down. In this case, the parties had agreed amongst themselves, with full knowledge and approval of the Court of Claims as evidenced by the allowance of six months to conduct discovery *after* the Court of Claims ruled on the summary disposition motions, that they would await the court's issuance of orders on the summary disposition motions that had been placed before the court some three years earlier in the belief that the court's ruling would distill down the issues in the case.

[8] Ohio charges $30 per year per vehicle and Idaho charges $21 per year. (App. 105-110).

of burden that Congress aimed to eliminate when it passed Section 601 of the F4A in the summer of 1994. Despite the prompt legal challenges initiated over nine years ago to the continued imposition of those regulatory fees, the courts of Michigan, using precedent involving the affirmance of a truncated and rushed administrative agency decision designed to protect its own fund raising mechanism, has allowed those fees to continue to be charged ever since.

REASONS FOR GRANTING THE WRIT

This case represents a direct affront by a state to a clear Congressional mandate of federal preemption of intrastate laws regulating price, route, or service of intrastate motor carriers, and is contrary to this Court's recent determination in *City of Columbus v. Ours Garage and Wrecker Service*, 536 U.S. 424, 442, 122 S.Ct. 2226, 153 L.Ed.2d 430 (2002) that regulation "not genuinely responsive to safety concerns garners no exemption" from the preemption. The Michigan Motor Carrier Act was over 60 years old at the time of the federal preemption. It has always been rooted in economic regulatory principles which pitted carrier against carrier and, more occasionally, carrier against shipper, in battles over entry, competition, and price in the trucking industry. That Congress left to the states in Section 601 certain specified residual authority over safety of motor vehicles, and insurance filing by motor carriers themselves, did not give license to the State of Michigan to continue to impose the $100 per vehicle per year regulatory fee for the purposes contained in the MMCA, virtually all of which had been preempted by the F4A. Michigan's actions ignore an Act of Congress which

was a valid exercise of federal powers under the Commerce Clause. Michigan should not be allowed to continue to burden interstate commerce with a fee which had been designed to support an elaborate economic intrastate regulatory structure. Michigan also puts motor carriers which compete with air carriers, such as United Parcel Service, at a continuing competitive disadvantage, directly contrary to the Congressional intent behind the preemption in the first place. The writ should be granted.

A. The Michigan Courts Ignored The Letter And Spirit Of Federal Preemption Of Intrastate Truck Regulation

The Supremacy Clause of the U.S. Constitution, Art. VI, cl. 2, provides that United States statutes "shall be the supreme Law of the Land; . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." This provision is the foundation of preemption analysis. Determination of preemption questions requires an examination of the "ultimate touchstone," Congressional intent. As the Supreme Court stated in *Fidelity Federal Savings and Loan Association v. de la Cuesta*, 458 U.S. 141, 152-153, 102 S.Ct. 3014, 73 L.Ed.2d 664 (1982), preemption may be either express or implied, and is "'compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose.'" An examination of the Congressional purpose points to the clear error of the state courts below in finding the intrastate regulatory fees not preempted.

With regard to intent, Congress made certain express findings when it passed the federal preemption of state

regulation of price, route, or service of motor carriers. As set forth in the F4A, Congress determined:

> (1) the regulation of intrastate transportation of property by the States has –
>
> (A) imposed an unreasonable burden on interstate commerce;
>
> (B) impeded the free flow of trade, traffic, and transportation of interstate commerce; and
>
> (C) placed an unreasonable cost on the American consumers . . .

108 Stat. 1605. By continuing to assess the onerous annual regulatory fees on intrastate motor carriers from what was an economic regulatory statute, Michigan continues to impose an unreasonable burden on interstate commerce, impede the free flow of trade, and place an unreasonable cost on American consumers, just as Congress found with the state economic regulation of motor carriers generally, at the time that the preemption legislation was enacted.

Congress particularly indicated in the legislative history that it desired to accomplish the same broad preemption of state regulation that it had wrought in the earlier deregulation of airlines. H.R. Conf. Rep. No. 103-677, *supra*, at p. 83. Congress even cited the Supreme Court's *Morales* decision, *supra*, and its desire to follow "the broad preemption interpretation" of that case. H.R. Conf. Rep. No. 103-677, *supra*, at p. 83. *Morales* involved an injunction action brought by the airlines which sought to prevent enforcement of state deceptive practices laws against their advertising. In ruling that the state

guidelines concerning such fair advertising had been expressly preempted by the ADA, the Supreme Court emphasized that the key "relating to" phrase in the Act was "a broad one . . . and the words thus express a broad preemptive purpose." *Morales, supra*, at 383. The court further proclaimed:

> . . . State enforcement actions having a connection with or reference to airline 'rates, routes, or services' are pre-empted under 49 U.S.C.App. § 1305(a)(1).

Morales, supra, at 384. Thus, the state attempts to regulate airline advertising fell in the face of the federal preemption.

This Court encountered a second case involving the meaning of the ADA preemption shortly after the F4A motor carrier preemption had taken effect, in *American Airlines, Inc. v. Wolens*, 513 U.S. 219, 115 S.Ct. 817, 130 L.Ed.2d 715 (1995). In that case, the Supreme Court ruled on a case commenced by frequent flyer members against an airline for violations of a state consumer fraud act and also for breach of contract. This Court in *Wolens* allowed the breach of contract action to survive, while declaring preempted the claim based on the state consumer fraud law. With respect to the claim grounded in the consumer fraud statute, the Court stated:

> American maintains, and we agree, that 'Congress could hardly have intended to allow the States to hobble [competition for airline passengers] through the application of restrictive state laws.'

Wolens, supra, 513 U.S. at 228. On the other hand, the state law breach of contract action was viewed by the Court in *Wolens* as an action to determine whether an

airline's own contractual undertakings have been breached, which had nothing to do with restrictive state enforcement.

The residual safety regulatory authority of the state does not save the intrastate economic regulatory fee from the broad preemption of the F4A in this case. That remaining state regulatory authority is delineated at 49 U.S.C. § 14501(c)(2)(A). According to the statute's own terms, the preemption does not affect a state's safety regulatory authority with respect to: 1) "*motor vehicles*;" 2) "highway route controls or limitations based on the size or weight of the *motor vehicle* or the hazardous nature of the cargo;" or 3) the regulation of "*motor carriers* with regard to minimum amounts of financial responsibility relating to insurance requirements and self-insurance authorization." *Id.* (App. 76). Thus, the state has authority over "motor vehicles" with respect to safety, size and weight, route controls, and hazardous cargo limitations. The state has authority remaining over "motor carriers" only with respect to insurance issues. The MMCA imposes the intrastate fee, however, on motor carriers. It does not have the authority to do so.

This use of disparate language, giving the states authority over motor vehicles at one point in this section and over motor carriers in another, must be presumed to be intentional. See, in this regard, *Russello v. United States*, 464 U.S. 16, 104 S.Ct. 296, 78 L.Ed.2d 17 (1983). As the court there stated, at 464 U.S. 23:

> '[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally or purposely in the disparate inclusion or exclusion.'

That is the situation here. Congress chose to confer authority to the states over motor carriers only on the subject of insurance. It could have provided state authority over motor carriers with regard to both safety and the other subjects, but did not do so.

Of course, this Court examined the *Russello* exception in a recent decision involving the interpretation of the scope of exceptions to the F4A preemption, that being *Ours Garage*, *supra*. In that case, the court held that 49 U.S.C. § 14501(c)(2)(A) (App. 76) " . . . spares from preemption local as well as state regulation." 536 U.S. 442. This was true even though political subdivisions of states had not been mentioned in the "safety authority" exception as they had been at several other points in the F4A preemption. In discussing the *Russello* precedent, the Supreme Court stated:

> The *Russello* presumption – that the presence of a phrase in one provision and its absence in another reveals Congress' design – grows weaker with each difference in the formulation of the provisions under inspection.

536 U.S. 435-436. In the instant provision, the same distinction does not apply. The disparate language is used in the very same subsection, 49 U.S.C. § 14501(c)(2)(A). That provision leaves authority to the states and, after *Ours Garage*, their political subdivisions, *with respect to motor vehicles*, on the subject of safety, highway route controls, and hazardous cargo, and, *with respect to motor carriers*, on insurance filings. There are not the numerous differences in formulation that the Court noted in *Ours Garage*. Neither do the other reasons stated in *Ours Garage* for disregarding the *Russello* presumption arise.

The fee thwarts the broad regulatory effect of the preemption intended by Congress. It also continues to place ground carriers at a competitive disadvantage with air carriers, which are not required to pay the annual fee.

Michigan still has safety authority over vehicles. That safety authority is exercised by a separate state agency, the Motor Carrier Division of the Michigan State Police, which administers the separate Motor Carrier Safety Act of 1963, MCL 480.11(a), *et seq.* The provisions of that Act apply to the operation of all commercial motor vehicles on Michigan highways and not just for-hire intrastate carriers. Similarly, the size and weight laws are enforced by the Michigan State Police, as well as political subdivisions of the state. The MPSC still has the authority, under the plain language of the preemption, to require insurance filings to be made and for carriers to register their intrastate operations, which they do. There is certainly no justification, however, for the MPSC to impose on intrastate carriers the regulatory fee of $100 per self-propelled vehicle annually, when the registration fee for interstate carriers cannot exceed $10 per vehicle per year for the filing of satisfactory proof of required insurance with the states. See 49 U.S.C. § 14504(c)(2)(B)(iv)(3). At a fee ten times that level, Michigan still continues to burden interstate commerce through the assessment of an intrastate economic regulatory fee, when Michigan is no longer regulating motor carriers economically.

As this Court stated in *Ours Garage*, *supra*, at 536 U.S. 442:

> We reiterate that § 14501(c)(2)(A) shields from preemption only 'safety regulatory authority' (and 'authority of a State to regulate . . . with

> regard to minimum amounts of financial responsibility relating to insurance requirements'). Local regulation of prices, routes, or services of tow trucks that is not genuinely responsive to safety concerns garners no exemption from § 14501(c)(1)'s preemption rule.

The Supreme Court further noted that it was expressing no opinion on the issue of whether the regulations of the municipality in that case qualified in whole or part for the preemption exemption.

The economic regulatory fee contained in the MMCA, imposed by the Michigan statute's own terms "from each motor carrier for the administration of this act," flies defiantly in the face of the federal preemption. It prevents an even playing field for air and ground carriers. It should have been held preempted below.

B. All Of The Pre-Preemption Michigan Authority Supports The Underlying Economic Regulatory Purpose Of The MMCA

The Michigan courts below relied upon a single case, *In Re Federal Preemption*, *supra*, in finding that the intrastate fee had not been preempted. This precedent, again, involved a challenge to an administrative proceeding commenced by the MPSC within days of the enactment of the F4A preemption, which proceeding had as its clear purpose from the outset the preservation of the economic regulatory fees generated by the MMCA as well as the maximum protection of the MPSC's jurisdiction and role. It was the burden of appellants in that case, pursuant to the state standard for appellate review of decisions from that agency, "to show by clear and satisfactory evidence that the order of the PSC complained of is unlawful or

unreasonable." 223 Mich.App. 295. As the MPSC itself summarized the position of its staff in the administrative proceeding:

> The Staff takes the position that, based on (1) the language of Section 601, (2) statements found in the August 5, 1993 Conference Report issued by Congress in conjunction with the FAA Act (Conference Report), and (3) federal court rulings concerning similar legislation, the pre-emptive effect of Section 601 *is relatively narrow*.

T-1273, p. 5. (Emphasis supplied). The MPSC reflexively endorsed its own staff's view, despite the fact that it was directly contrary to Congressional intent about the scope of the preemption. The Michigan courts rubber-stamped the same. They did so without a review of their own past decisions interpreting that Act.

The MMCA became effective on October 17, 1933, in the middle of the Great Depression. The Michigan Supreme Court shortly had occasion to examine a decision under the then new Act, *In Re Joe Brown & Sons*, 273 Mich. 652, 263 N.W. 887 (1935), which case, although turning on procedural grounds, involved the question of whether an applicant should be awarded authority to transport iron and iron products generally between Muskegon, Grand Rapids, and Detroit and various points or be limited within such geographical territory to the transportation of only certain types of iron and iron products (coil springs, sheet steel, scrap iron, scrap metals, and used machinery). *In Re Joe Brown* was a portent of the cases to come. One proceeding, *Associated Truck Lines, Inc. v. Michigan Public Service Commission*, 377 Mich. 259, 140 N.W.2d 515 (1966), *appeal after remand*, sub. nom. 73 Mich.App. 476, 252 N.W.2d 495 (1977), *appeal after*

remand, 94 Mich.App. 241, 269 N.W.2d 548 (1978), *remanded*, 404 Mich. 808, 272 N.W.2d 563, a transfer of operating rights proceeding involving the issue of whether a carrier, Yellow Transit Freight Lines, Inc., had abandoned its Michigan intrastate authority prior to attempting to transfer the same, lasted nearly 18 years and, in addition to the published opinions referenced, was the subject of numerous unpublished opinions by the appellate court of first review. The focus of such cases was entirely economic.

That emphasis did not change until the time of the MMCA's preemption. See, in this regard, *Michigan Intra-State Motor Tariff Bureau, Inc. v. Michigan Public Service Commission*, 200 Mich.App. 381, 504 N.W.2d 677 (1993), involving the propriety of an MPSC order revoking approval on the part of certain organizations to conduct collective rate making, and *Federal Armored Service v. Michigan Public Service Commission*, 204 Mich.App. 24, 514 N.W. 2d 178 (1994), interpreting the meaning of the term "demonstrated public need" and the quality of shipper support evidence required for a proposed new motor carrier service, as well as that applicant's financial fitness. Indeed, over the MMCA's 60-plus years, all decisions turned on the economic regulation which Congress intended to preempt through Section 601 of the F4A.[9] The

[9] See, also, *In Re Application of Smith*, 270 Mich. 343, 345, 259 N.W. 119 (1935), in which the Michigan Supreme Court rejected appellant's argument that the Commission's findings "amount[ed] to a stifling of legitimate competition"; *Giaras v. Michigan Public Service Commission*, 301 Mich. 262, 3 N.W.2d 268 (1942), in which at issue was the propriety of the Commission's denial of an application for authority based on adequate service already received from protesting carriers;

(Continued on following page)

courts below were wrong to rest their decisions on the appeal in *In Re Federal Preemption of Provisions of the Motor Carrier Act, supra*, a decision which particularly noted that "the PSC does not possess the power to determine the constitutionality of statutes, and direct challenges to the constitutionality of statutes belong in a different forum." *Id.* at 203. The courts below, as did the precedent upon which they relied, ignored the language of Congress and their own past decisions in straining to convert an economic regulatory fee into a safety regulatory fee, when the only safety regulation which remained for existing intrastate carriers was the filing of insurance. To rectify this blatant affront to the primacy of a

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Kirkby v. Michigan Public Service Commission, 320 Mich. 608, 32 N.W.2d 1 (1948), in which at issue was the question of whether the MPSC could issue a certificate of authority greater than that applied for; *Furniture Capital Truck Lines, Inc. v. Michigan Public Service Commission*, 340 Mich. 173, 65 N.W.2d 303 (1954), in which the issue addressed was the validity of a Commission order revoking a permit for non-use; *J.E. Bejin Cartage Co. v. Michigan Public Service Commission*, 352 Mich. 139, 89 N.W.2d 107 (1958), in which the issue involved was prior abandonment or discontinuance of authority in a transfer case; *Greyhound Corporation v. Michigan Public Service Commission*, 360 Mich. 578, 104 N.W.2d 395 (1960), where the issue was a grant of an extension of authority to United Parcel Service, Inc. and whether it was a contract, as opposed to a common carrier; *Telischak Trucking, Inc. v. Michigan Public Service Commission*, 11 Mich.App. 23, 160 N.W.2d 592 (1968), which had to do with a complaint proceeding and whether a carrier's authority contained a commodity restriction as opposed to a job site delivery restriction; and *G & B Transportation Co. v. Michigan Public Service Commission*, 19 Mich.App. 379, 172 N.W.2d 898 (1969), where the Commission interpreted what shipments were authorized under a grant of authority reading Grand Rapids and vicinity. These, and every other published appellate court decision, support the economic regulatory purpose of the MMCA and the fee which it generated.

Congressional statute involving interstate commerce, and the concomitant negative effect thereon by intrastate economic regulation of the motor carrier industry, a writ should issue.

CONCLUSION

The MMCA calls for "fees," not taxes, to be imposed on motor carriers for the administration of an intrastate economic regulatory act, preempted by Section 601 of the F4A. These fees amount to tens and even hundreds of thousands of dollars per year for the largest carriers. As they impose additional costs on providing intrastate transportation in Michigan, they burden interstate commerce, just as much as did the economic regulation which the fees were designed to support. They prevent ground carriers from competing on a fair basis with air carriers. Michigan should not be allowed to continue this disregard of federal preemption, any more than was the case in *Yellow Transportation, Inc. v. Michigan*, 537 U.S. 36, 123 S.Ct. 371, 154 L.Ed.2d 377 (2002). This Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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**Counsel of Record*

APPENDIX A

STATE OF MICHIGAN

COURT OF APPEALS

WESTLAKE TRANSPORTATION, INC., VANDERKOOI CARRIERS, INC., EL TORO MOTOR FREIGHT, INC., MYRIAH, INC., PRISM, INC., GERRIGS TRUCKING & LEASING, INC., and BEST WAY EXPRESS, INC.,

Plaintiffs-Appellants,

and

AMERICAN TRUCKING ASSOCIATION, INC. and TNT HOLLAND MOTOR EXPRESS, INC.,

Intervening Plaintiffs-Appellants,

v

MICHIGAN PUBLIC SERVICE COMMISSION, DEPARTMENT OF TREASURY, and the STATE OF MICHIGAN,

Defendants-Appellees.

FOR PUBLICATION
March 11, 2003
9:00 a.m.

No. 226052; 226122
Court of Claims
LC No. 95-015628-CM

TROY CAB, INC., DEECO SERVICES, INC., d/b/a DEECO TRANSPORTATION, TIBERIO FRANK, d/b/a FAIRFIELD TOWING, ELEX, INC., d/b/a LAFOND EXPRESS, DALE CONSTINE & SONS, INC., CALCUT SALES & SERVICES, INC., d/b/a CALCUT TRUCKING COMPANY,

AMBASSADOR TRANSPORTATION, INC., HAWKINS STEEL CARTAGE, INC., MIDCON FREIGHT SYSTEMS, INC., JLH TRANSFER, INC., H & H ENTERPRISES, INC., d/b/a S & M CARTAGE, INC., CENTRAL TRANSPORT, INC., BANCROFT TRUCKING COMPANY, US TRUCK COMPANY, INC., WEST END CARTAGE, INC., CENTRAL CARTAGE COMPANY, CTX, INC., MOHAWK MOTOR MICHIGAN, INC., ECONOMY TRANSPORT, INC., MCKINLAY TRANSPORT LIMITED, MASON & DIXON LINES, INC., UNIVERSAL AMCAN LIMITED, ROMEO EXPEDITERS, INC., TOM THUMB SERVICES, INC., d/b/a REI, OJ TRANSPORT COMPANY, JLAW ENTERPRISES INC., and OJ TRANSPORT, INC.,

Plaintiffs-Appellants,

and

AMERICAN TRUCKING ASSOCIATION, INC., and TNT HOLLAND MOTOR EXPRESS, INC.,

Intervening Plaintiffs-Appellants,

v

MICHIGAN PUBLIC SERVICE COMMISSION, DEPARTMENT OF TREASURY, DEPARTMENT OF COMMERCE, and the STATE OF MICHIGAN,

Defendants-Appellees.

No. 226053; 226137
Court of Claims
LC No. 95-015631-CM

Updated Copy
May 9, 2003

Before: Markey, P.J., and Saad and Smolenski, JJ.

SMOLENSKI, J.

In these consolidated class actions, plaintiffs, individual class-representative trucking companies, and intervening plaintiffs, two trucking companies, appeal by right from a December 30, 1998, judgment of the Court of Claims that granted summary disposition in favor of defendants. The appeals were consolidated. We affirm.

I

This case involves the effect of several federal laws, specifically 49 USC 11501, 49 USC 11506, and subsection 601(h) of the Federal Aviation Administration Authorization Act of 1994 (FAAAA), PL 103-105, subsection 601(h), on various provisions of Michigan's Motor Carrier Act (MCA), MCL 475.1 *et seq.* This litigation began on January 3, 1995, when plaintiffs Westlake Transportation, Inc., et al., filed their complaint, alleging that the state's $100 annual fees for interstate and intrastate motor carriers were unconstitutional because federal laws, 49 USC 11506 and 49 USC 11501, respectively, preempted the state laws. On January 9, 1995, Troy Cab, Inc., et al., filed their complaint, and made similar allegations.

In Michigan, since 1933, motor-carrier regulation has been pursuant to the Michigan MCA. The act authorizes the Michigan Public Service Commission (PSC) to enforce the act. MCL 475.1(c); MCL 475.2. Under the MCA, motor carriers must pay a fee of $100 for each application filed with the commission for a certificate of authority or for a permit to operate intrastate. MCL 478.1. Also, motor carriers are required to pay an annual fee of $100 a vehicle

for the administration of the act. MCL 478.2(1) and (2). Subsection 1 applies to motor-carrier vehicles that operate intrastate pursuant to a certificate of authority, while subsection 2 applies to motor-carrier vehicles licensed in Michigan that engage entirely in interstate commerce.[1] The act also provides that motor carriers that are registered outside Michigan are required to pay a registration fee of $10 a vehicle. MCL 478.7.

In February 1995, intervening plaintiffs filed their complaint, alleging that the intrastate-decal fee violated the Commerce Clause, US Const, art I, § 8, cl 3, and were subsequently granted the right to intervene. Plaintiffs Westlake Transportation, Inc., et al., and intervening plaintiffs both amended their complaints, adopting the other's substantive claims. The plaintiffs' cases were consolidated in April 1995 and the classes were certified in June 1995.

On June 22, 1995, plaintiffs filed two separate motions for partial summary disposition pursuant to MCR 2.116(C)(10): one regarding their intrastate-preemption claim and the other regarding their interstate-preemption claim. On June 30, 1995, intervening plaintiffs filed their motion for partial summary disposition pursuant to MCR 2.116(C)(10), regarding their claim alleging violation of the Commerce Clause. On October 27, 1995, defendants renewed their own motion for summary disposition. The Court of Claims issued its opinion on October 13, 1998,

[1] The fees in MCL 478.1 and 478.2(1) will be referred to as the "intrastate fees," and the fee in MCL 478.2(2) will be referred to as the "interstate fee."

concluding that plaintiffs' and intervening plaintiffs' claims were meritless, and denied their motions for partial summary disposition in an order entered on November 12, 1998. Subsequently, the court granted defendants' motion for summary disposition "for the reasons defendants stated in their November 10, 1998 supplemental brief," which relied on the court's October 13, 1998, opinion.

The court concluded that § 601 of the FAAAA did not preempt MCL 478.2(1) because the federal law did not preempt safety-related regulatory fees. The court also found that MCL 478.2(2) was not preempted because the federal law imposed the $10 maximum only on "participating states," not "registration states." The court further determined that MCL 478.2(1) did not implicate the Commerce Clause because it did not burden foreign motor carriers more heavily as compared to Michigan motor carriers engaged in interstate commerce, since the state statute only affects Michigan motor carriers who engage solely in intrastate commerce. Plaintiffs filed a motion for reconsideration, which was denied. Plaintiffs and intervening plaintiffs now appeal by right.

II

Summary disposition of all or part of a claim or defense may be granted when

> [e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law. [MCR 2.116(C)(10).]

A motion for summary disposition under MCR 2.116(C)(10) tests whether there is factual support for a claim, and is reviewed de novo on appeal. *Spiek v Dep't of*

Transportation, 456 Mich 331, 337; 572 NW2d 201 (1998). When deciding a motion for summary disposition, a court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence submitted in the light most favorable to the nonmoving party. *Ritchie-Gamester v Berkley,* 461 Mich 73, 76; 597 NW2d 517 (1999). A motion for summary disposition based on the lack of a material factual dispute must be supported by documentary evidence. MCR 2.116(G)(3)(b), *Meyer v Center Line,* 242 Mich App 560, 574; 619 NW2d 182 (2000). All reasonable inferences are to be drawn in favor of the nonmovant. *Bertrand v Alan Ford, Inc,* 449 Mich 606, 618; 537 NW2d 185 (1995).

III

Plaintiffs argue that MCL 478.2(2) is preempted by federal law, specifically 49 USC 11506.[2] Determining whether federal law preempts a state law presents an issue of statutory construction and is a question of law. *Konynenbelt v Flagstar Bank, FSB,* 242 Mich App 21, 27; 617 NW2d 706 (2000). Congressional intent is the cornerstone of preemption analysis. *Fort Halifax Packing Co, Inc v Coyne,* 482 US 1, 8; 107 S Ct 2211; 96 L Ed 2d 1 (1987).

The Supremacy Clause of the United States Constitution provides Congress with the power to preempt state law. US Const, art VI, cl 2. A general presumption exists in the law against federal preemption. *Duprey v Huron & E R Co, Inc,* 237 Mich App 662, 665; 604 NW2d 702 (1999).

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[2] This statute is currently codified as 49 USC 14504; however, we will refer to the law as § 11506.

Federal preemption occurs only under certain conditions, such as when (1) Congress enacts a federal statute that expresses a clear intent to preempt state law, (2) an outright or actual conflict exists between federal and state law, (3) compliance with both federal and state law is effectively impossible, (4) an implicit barrier to state regulation exists in federal law, (5) Congress has legislated comprehensively, thereby occupying an entire field and leaving no room for supplemental state law, or (6) the state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress. *Id.*

49 USC 11506 provided, in part:

> (b) General rule. – The requirement of a State that a motor carrier, providing transportation subject to jurisdiction under subchapter I of chapter 135 and providing transportation in that State, must register with the State is not an unreasonable burden on transportation referred to in section 13501 when the State registration is completed under standards of the Secretary under subsection (c). When a State registration requirement imposes obligations in excess of the standards of the Secretary, the part in excess is an unreasonable burden.
>
> (c) Single State registration system. –
>
> (1) In general. – The Secretary shall maintain standards for implementing a system under which –
>
> (A) a motor carrier is required to register annually with only one State by providing evidence of its Federal registration under chapter 139;

(B) the State of registration shall fully comply with standards prescribed under this section; and

(C) such single State registration shall be deemed to satisfy the registration requirements of all other States.

(2) Specific requirements. –

(A) Evidence of Federal registration; proof of insurance; payment of fees. – Under the standards of the Secretary implementing the single State registration system described in paragraph (1) of this subsection, only a State acting in its capacity as registration State under such single State system may require a motor carrier registered by the Secretary under this part –

(i) to file and maintain evidence of such Federal registration;

(ii) to file satisfactory proof of required insurance or qualification as a self-insurer;

(iii) to pay directly to such State fee amounts in accordance with the fee system established under subparagraph (B)(iv) of this paragraph, subject to allocation of fee revenues among all States in which the carrier operates and which participate in the single State registration system; and

(iv) to file the name of a local agent for service of process.

(B) Receipts; fee system. – The standards of the Secretary –

(i) shall require that the registration State issue a receipt, in a form prescribed under the

standards, reflecting that the carrier has filed proof of insurance as provided under subparagraph (A)(ii) of this paragraph and has paid fee amounts in accordance with the fee system established under clause (iv) of this subparagraph;

(ii) shall require that copies of the receipt issued under clause (i) of this subparagraph be kept in each of the carrier's commercial motor vehicles;

(iii) shall not require decals, stamps, cab cards, or any other means of registering or identifying specific vehicles operated by the carrier;

(iv) shall establish a fee system for the filing of proof of insurance as provided under subparagraph (A)(ii) of this paragraph that –

(I) is based on the number of commercial motor vehicles the carrier operates in a State and on the number of States in which the carrier operates;

(II) minimizes the costs of complying with the registration system; and

(III) results in a fee for each participating State that is equal to the fee, not to exceed $10 per vehicle, that such State collected or charged as of November 15, 1991; and

(v) shall not authorize the charging or collection of any fee for filing and maintaining evidence of Federal registration under subparagraph (A)(i) of this paragraph.

(C) Prohibited fees. – The charging or collection of any fee under this section that is not in accordance with the fee system established under

> subparagraph (B)(iv) of this paragraph shall be deemed to be a burden on interstate commerce.

The MCA applies to entities engaged in interstate commerce only to the extent it is consistent with federal law. MCL 476.12. MCL 478.2(2) provides, in pertinent part, "A motor carrier licensed in this state shall pay an annual fee of $100.00 for each vehicle operated by the motor carrier which is registered in this state and operating entirely in interstate commerce."[3]

Plaintiffs contend that the interstate fee was preempted both before and after the implementation of the Single State Registration System (SSRS) on January 1, 1994. With the implementation of the SSRS, § 11506 was amended and significant language changes were made. We will first address plaintiffs' preemption argument regarding § 11506 after January 1, 1994. However, before we do so, an understanding of the evolution of this federal law is helpful. The United States Supreme Court has summarized this evolution in *Yellow Transportation, Inc v Michigan,* 537 US ___, ___; 123 S Ct 371, 374-375; 154 L Ed 2d 377, 383-384 (2002):

> Beginning in 1965, Congress authorized States to require interstate motor carriers operating within their borders to register with the State proof of their Interstate Commerce Commission (ICC) interstate operating permits. Pub L 89-170, 79 Stat 648, 49 USC § 302(b)(2) (1970 ed). Congress provided that state registration requirements

[3] The subsection also provides that the fee is only $50 if the motor carrier begins operations after June 30th of the year. The other provisions in the subsection are not at issue in this appeal.

would not constitute an undue burden on interstate commerce so long as they were consistent with regulations promulgated by the ICC. *Ibid.*

Prior to 1994, the ICC allowed States to charge interstate motor carriers annual registration fees of up to $10 per vehicle. See 49 CFR § 1023.33 (1992). As proof of registration, participating States would issue a stamp for each of the carrier's vehicles. § 1023.32. The stamp was affixed on a "uniform identification cab car[d]" carried in each vehicle, within the square bearing the name of the issuing State. § 1023.32(d)-(e). This system came to be known as the "bingo card" system. *Single-State Insurance Registration,* 9 ICC2d 610, 610 (1993).

The "bingo card" regime proved unsatisfactory to many who felt that the administrative burdens it placed on carriers and participating States outweighed the benefits to those States and to the public. HR Rep No 102-171, pt I, p 49 (1991), HR Conf Rep No 102-404, pp 437-438 (1991), US Code Cong & Admin News 1991, pp 1526, 1679. In the Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA), Congress therefore directed the ICC to implement a new system to replace the "bingo card" regime.* See Pub L 102-240, § 4005, 105 Stat 1914, 49 USC § 11506(c) (1994 ed). Under the new system, called the Single State Registration System, "a motor carrier [would be] required to register annually with only one State," and "such single State registration [would] be deemed to satisfy the registration requirements of all other States." §§ 11506(c)(1)(A) and (C). Thus, one State would – on behalf of all other participating States – register a carrier's vehicles, file and maintain paperwork, and collect and distribute

registration fees. § 11506(c)(2)(A). Participation in the Single State Registration System was limited to those States that had elected to participate in the "bingo card" system. § 11506(c)(2)(D).

ISTEA also capped the per-vehicle registration fee that participating States could charge interstate motor carriers. Congress directed the ICC to "establish a fee system . . . that (I) will be based on the number of commercial motor vehicles the carrier operates in a State and on the number of States in which the carrier operates, (II) will minimize the costs of complying with the registration system, and (III) will result in a fee for each participating State that is equal to the fee, not to exceed $10 per vehicle, that such State collected or charged as of November 15, 1991." § 11506(c)(2)(B)(iv). Congress provided that the charging or collection of any fee not in accordance with the ICC's fee system would "be deemed to be a burden on interstate commerce." § 11506(c)(2)(C).

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*Congress abolished the ICC in 1995 and assigned responsibility for administering the new Single State Registration System to the Secretary of Transportation. See ICC Termination Act of 1995, Pub L 104-88, § 101, 109 Stat 803. The provisions of ISTEA governing the system were amended and recodified. See 49 USC § 14504(c). The Federal Highway Administration, under the Secretary of Transportation, adopted the ICC regulations that implemented the Single State Registration System, 61 Fed Reg 54706, 54707 (1996), and the Federal Motor Carrier Safety Administration now has authority to administer the system, 49 USC § 113(f)(1).

A

Plaintiffs argue that the federal statutory language is clear – a state may charge a maximum registration fee of $10 a vehicle to motor carriers engaged in interstate commerce, regardless of whether a motor carrier is registered in Michigan or another state. Plaintiffs acknowledge that MCL 478.7 reflects the mandate of § 11506 with regard to motor carriers registered out of state,[4] and asserts that motor carriers registered in Michigan are required to be charged similarly.

Defendants' counterargument is two-fold. First, § 11506 applies to registration fees only, not regulatory fees, and the interstate fee at issue is a regulatory fee. Second, the fee limit in § 11506 applies to participating states only, not the registration state. The court agreed with defendants' argument and granted summary disposition on this issue for the same reasons. Therefore, the key questions are (1) to whom does the fee limit in § 11506 apply, and (2) to what type of fees. The answers to these questions can be found in the language of the statute itself and the federal regulations that interpret it.

It is not an unreasonable burden on interstate commerce to require vehicles to register with a state; however,

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[4] MCL 478.7 provides, in part:

> (4) The annual fee levied on each interstate or foreign motor carrier vehicle operated in this state and licensed in another state or province of Canada shall be $10.00. The commission may enter into a reciprocal agreement with a state or province of Canada that does not charge vehicles licensed in this state economic regulatory fees or taxes and may waive the fee required under this subsection.

any registration requirements of a state that are in excess of the standards in subsection 11506(c) are considered an unreasonable burden. Subsection 11506(b). Under the SSRS, a motor carrier is required to register annually with only one state, and that registration satisfies the registration requirements of all the states. Subsection 11506(c)(1)(A). A motor carrier may only register with a participating state, a state which participated in the old "bingo card" system. Subsection 11506(c)(2)(D). The motor carrier must register with the state where its principal place of business is located, if it is a participating state, or else register with the participating state in which it operates the most vehicles. 49 CFR 367.3.[5] Therefore, a registration state, the state in which a motor carrier registers, is by definition a participating state. Michigan is a participating state, *Yellow Transportation, supra,* 123 S Ct 376; 154 L Ed 2d 385, and therefore, can be a registration state.

The registration state may require a motor carrier to (1) file proof of its federal registration (ICC permit), (2) file proof of insurance, (3) file the name of its agent for service of process, and (4) pay a fee. Subsection 11506(c)(2)(A). The registration state is then to issue the motor carrier a receipt, reflecting that proof of insurance was filed and that the fee was paid, a copy of which is to be kept in the carrier's vehicles. Subsection 11506(c)(2)(B). The fee is for the filing of the proof of insurance, and may not be charged for the filing of the motor carrier's ICC permit. Subsections 11506(c)(2)(B)(iv) and (v).

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[5] 49 CFR 1023.1 *et seq.*, was recodified as 49 CFR 367.1 *et seq.*

In support of the registration fee, the motor carrier must file with the registration state a form that delineates (1) the number of vehicles it intends to operate in each participating state, (2) the fee each participating state charges each vehicle, (3) the total fee due each participating state, and (4) the total of all the fees due. 49 CFR 367.4(c)(4). The fee each participating state is allowed to charge each vehicle is equal to the amount the state charged or collected as of November 15, 1991, not to exceed $10. Subsection 11506(c)(2)(B)(iv)(III); 49 CFR 367.4(c)(4)(ii). Congress wanted to "minimize[] the costs of complying with the registration system" for the motor carriers, subsection 11506(c)(2)(B)(iv)(II), while at the same time preserving "revenues for the states which had participated in the bingo program," HR Conf Rep No 102-404 reprinted in 1991 USCCAN 1817. The fees a registration state collects on behalf of other participating states are remitted to those states monthly. 49 CFR 367.6. Thus, if a motor carrier registered in Michigan, it would first list the number of vehicles it operated in each participating state. Because Michigan is a participating state, it would need to list the number of vehicles it operated in Michigan. The fee Michigan could charge cannot exceed $10.

We find that the statutory language and its accompanying federal regulations are clear. A registration state is simply a participating state in which a motor carrier is registering. Therefore, when the statute states that a participating state may not charge a fee in excess of $10, this includes the registration state. To conclude otherwise, that a registration state could set its own fee, would contravene the express language and purpose of the statute.

The next question is whether the $100 fee in MCL 478.2(2) is a registration fee, so that it is subject to the limitation in § 11506, or whether it is a regulatory fee. Plaintiffs assert that the fee is for all practical purposes a registration fee. Because the fee must be paid at the time a motor carrier registers with a state, and in return for the fee receives an identification decal, plaintiffs contend that one can only conclude that the fee is, in actuality, a registration fee. We disagree. Faced with a similar situation in *Franks & Son, Inc v Washington,* 136 Wash 2d 737, 759-760; 966 P2d 1232 (1998), the Washington Supreme Court rejected the plaintiffs' argument that because the regulatory fee and federal identification fee were collected at the same time, an unlawful registration requirement resulted. The court adeptly stated, "We believe a more realistic rationale for concurrent collection of the two fees was administrative convenience and efficiency." *Id.* at 760.

We find that the $100 interstate fee could reasonably be classified as a regulatory fee because it is a fee imposed for the administration of the MCA, particularly covering costs of enforcing safety regulations.[6] If the purpose of a fee is to regulate an industry or service, it can be properly classified as a regulatory fee. *Bolt v Lansing,* 459 Mich 152, 161-162; 587 NW2d 264 (1998). Because the fee in

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[6] Because vehicles licensed in Michigan that operate solely interstate are required to pay the $100 regulatory fee, the PSC waives the registration fee. *Schneider Nat'l Carriers, Inc v Michigan (On Remand),* 247 Mich App 716, 721; 637 NW2d 838 (2001). Hence, the registration fee Michigan charges for vehicles licensed in Michigan is $0, less than the $10 limit imposed by § 11506. Therefore, the registration fee is within the federal mandate.

MCL 478.2(2) is not a registration fee, it is not subject to preemption by 49 USC 11506.

Plaintiffs argue that the federal law prohibits construing the fee as a regulatory fee, citing *Roadway Express, Inc v Treasurer of State of Illinois,* 120 Ill App 3d 133; 458 NE2d 66 (1983). That case involved a $31 registration fee Illinois charged Ohio motor carriers. *Id.* at 133-134. At the time, the federal regulation allowed a maximum registration fee of $5 plus an additional reasonable fee imposed to defray the cost of the regulation of carriers within the state's borders. *Id.* at 135. Plaintiffs contend that *Roadway Express* "issued a warning" that "no such additional 'regulatory fee' was permissible after 1981" because the federal regulation interpreting § 11506 was amended in 1981 and set an absolute limit of $10 for identification fees. However, *Roadway Express* issued no such warning. The court merely noted, "again parenthetically," that the federal regulation, 49 CFR 1023.33 (redesignated), was amended and set the limit at $10. *Roadway Express, supra* at 135.

Plaintiffs appear to argue that because the amended federal regulation did not explicitly provide for an additional fee, one was hence prohibited. However, plaintiffs provide no support for their argument. Further, plaintiffs fail to recognize the import of two other regulations in existence at the time. 49 CFR 1023.105 (1991) (superseded) provided that the rules and regulations were not to be construed to affect the collection of taxes or fees by a state from motor carriers for the operation of vehicles within the borders of a state. 49 CFR 1023.104 (1991) (superseded) provided that states were "urged" to use fees collected for the purpose of defraying the cost of regulation of motor carriers within their borders. Therefore, the

ability of a state to collect fees in addition to the registration fees was not affected by the removal from § 1023.33 of the language providing for additional fees.[7]

B

Plaintiffs also argue that the interstate fee was prohibited before the creation of the SSRS in 1994, under the previous version of § 11506. Plaintiffs assert this argument because their complaint was filed in the beginning of 1995, and with a three-year period of limitation, plaintiffs contend that they are entitled to a refund for the excess fees they have paid since 1992.

Before the 1994 enactment of the SSRS, § 11506 read, in pertinent part:

> (b) The requirement of a State that a motor carrier . . . register the certificate or permit issued to the carrier under section 10922 or 10923 of this title is not an unreasonable burden on transportation referred to in section 10521(a)(1) and (2) of this title when the registration is completed under standards of the Commission under

[7] We note that the substance of 49 CFR 1023.104 and 1023.105 was not included in the 1994 amendments, 49 CFR 1023.1-1023.6. However, neither was there any express prohibition on state-imposed regulatory fees. The statute and its regulations address registration requirements only. Because there is a presumption against federal preemption, we believe that Congress's silence cannot be interpreted as prohibiting state regulatory fees, see *Wisconsin Pub Intervenor v Mortier,* 501 US 597, 607; 111 S Ct 2476; 115 L Ed 2d 532 (1991), particularly given that regulatory and registration fees can coexist in the same field without conflicting, *Duprey, supra* at 665.

> subsection (c) of this section. When a State registration requirement imposes obligations in excess of the standards, the part in excess is an unreasonable burden.
>
> (c)(1) The Commission shall maintain standards and amendments to standards (A) prepared and certified to it by the national organization of the State Commissions, and (B) prescribed by the Commission. . . .

The Commission prescribed the following interpretive regulation:

> The application for the issuance of such identification stamps or number shall . . . be duly completed and executed by an official of the motor carrier, and shall be accompanied by the fee, if any, prescribed by the law of such State; provided, however, that such fee shall not exceed $10 for the issuance of each such identification stamp; and provided further (when the State Commission assigns an identification number in lieu of issuing an identification stamp or stamps), that such fee shall not exceed $10 for each vehicle operated under the authority of the motor carrier identified in the cab card bearing such identification number. [49 CFR 1023.33 (superseded).]

The pre-1994 federal regulation substantively mirrored subsection 11506(c) as amended in 1994. Because we concluded that the interstate fee is a regulatory fee, it is outside the scope of the federal law and was not preempted.[8]

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[8] We note that the cases from other jurisdictions that plaintiffs cite are inapplicable in this case. The conclusion in this case turns on

(Continued on following page)

Accordingly, the court did not err in granting defendants summary disposition.

IV

In their complaints, plaintiffs and intervening plaintiffs allege that the intrastate fees in MCL 478.1 and MCL 478.2(1) were preempted by § 601 of the FAAAA. Subsection 601(h), which became effective on January 1, 1995, prohibited state regulation of prices, routes, or services of motor carriers, save for a few delineated exceptions. (Currently codified as 49 USC 14501[c].)

Plaintiffs argue that the court erred in granting defendants summary disposition on this issue before discovery was complete.[9] Plaintiffs assert that they should have been allowed an opportunity to conduct additional discovery in order to show that, as utilized, the intrastate fees are prohibited by federal law.

In re Fed Preemption of Provisions of the Motor Carrier Act, 223 Mich App 288, 302; 566 NW2d 299 (1997), held that § 601 did not preempt the entire MCA and did not indicate an intent to preempt fee provisions such as MCL 478.1 and MCL 478.2. The Court noted that in response to the enactment of the FAAAA, the PSC "issued considered decisions that indicated how its regulation of the trucking industry in Michigan was affected by federal

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whether the interstate fee is classified as a regulatory fee or a registration fee. In the cases plaintiffs cite, there was no disagreement that the fee at issue was a registration fee.

[9] We note that plaintiffs do not contest the court's summary-disposition ruling, that § 601 did not preempt the intrastate fees.

legislation preempting at least some aspects of state regulation." *In re Motor Carrier Act, supra* at 300. In regard to the fee provisions at issue, the Court stated:

> The PSC still has significant regulatory obligations. For example, the PSC must supervise and regulate the safety of motor carrier operations. MCL 479.41; MSA 22.587(1). There is still a certification process. It follows that the fees for obtaining a certificate of authority, MCL 478.1; MSA 22.560, for protesting an application for a certificate, MCL 478.1a; MSA 22.560(1), and for administering the act, MCL 478.2(1); MSA 22.561(1), are unaffected by the preemptive effect of § 601. In fact, *because the PSC is not using its resources to enforce preempted portions of the Motor Carrier Act, the fees collected by the PSC are not related to the preempted provisions and rules.* Indeed, appellants Central Transport and Universal Am-Can have not shown that the cost of the PSC's operations has ever been totally funded by the fees it collects, and they have not provided any reason to believe that the fees collected were or can be used only for what is now preempted economic regulation. [*Id.* at 302-303; emphasis added.]

Plaintiffs contend that the PSC intrastate fees were being used to fund preempted portions of the MCA, and, thus, the fees were related to a preempted provision. Therefore, the fees were also preempted. Plaintiffs did not submit any documentary evidence below in support of this contention. Plaintiffs argue that they had intended to do so, but their opportunity was foreclosed when the court denied their motion for partial stay and bifurcation of issues. Plaintiffs requested a 90- to 120-day stay in the proceedings to conduct discovery in order to present a

factual record to the court in a supplemental brief in response to the decision in *In re Motor Carrier Act, supra*; however, the court denied the motion without prejudice because it believed its summary-disposition ruling would cover the issue.

A court's decision regarding matters of discovery is reviewed on appeal for an abuse of discretion. *In re Pott,* 234 Mich App 369, 373; 593 NW2d 685 (1999). Plaintiffs could not address this Court's decision in *In re Motor Carrier Act, supra,* in their original motions for partial summary disposition because they were filed and argued in 1995, and the case was not decided until April 25, 1997. However, plaintiffs did not file their motion for partial stay and bifurcation of issues until March 1998, nearly one year later. The record indicates that plaintiffs were conducting discovery during this entire time, yet never sought evidence relating to this issue.

We find that plaintiffs had ample opportunity to conduct discovery following the decision in *In re Motor Carrier Act, supra,* and file a supplemental brief containing their findings. Given that one year had passed, we also find that there is no reason to believe that had plaintiffs been given another three or four months in which to conduct discovery, plaintiffs would have uncovered a factual basis for their claim. Furthermore, we note that by stipulation, discovery was to be completed 180 days after the court issued its ruling on the parties' motions for summary disposition.

Plaintiffs assert in their reply brief that they are not arguing that they were prevented from conducting discovery, but that they were denied an opportunity to supplement their motion papers. However, the court did not

foreclose plaintiffs' opportunity to present their argument. They could have filed additional briefs at any time before the court issued its ruling. In fact, on January 28, 1998, plaintiffs filed a supplemental brief in support of their motions for summary disposition and in opposition to defendants' motion, in which they specifically mentioned *In re Motor Carrier Act, supra*. This indicates plaintiffs were well aware of the import of the case, and could have conducted discovery and presented their argument accordingly. Plaintiffs mention that defendants did not submit the opinion as authority until January 1998. However, *In re Motor Carrier Act* was decided in April 1997, and nothing prevented plaintiffs from proactively distinguishing their case from it.

Moreover, the court specifically invited plaintiffs to present their argument again if they thought its ruling did not adequately cover the issue. Plaintiffs did file a motion for reconsideration after the court issued its orders on the parties' motions for summary disposition, yet did not reraise this issue. We recognize that plaintiffs renewed their motion to stay on October 8, 1998; however, this was before the court issued its ruling. Because the court had not yet issued its ruling, plaintiffs could have attempted to conduct discovery after its first motion was denied.

Therefore, we conclude that the court did not abuse its discretion in denying plaintiffs' request to stay the proceedings in order to conduct additional discovery. A decision of a court that obtained the correct result, albeit for a different reason, will be affirmed on appeal. *Lavey v Mills*, 248 Mich App 244, 250; 639 NW2d 261 (2001).

V

Plaintiffs Troy Cab, Inc., et al., allege that the intrastate fees in MCL 478.1 and MCL 478.2(1) are unconstitutional taxes in violation of various sections of the Michigan Constitution. The fees at issue are credited to the PSC. MCL 478.6. Whether a charge is a permissible fee or an illegal tax is a question of law. *Bolt, supra* at 158. A court's factual findings are reviewed for clear error. A finding is clearly erroneous when, although there is evidence to support it, upon reviewing the entire record, the appellate court is left with a definite and firm conviction that a mistake was made. *Christiansen v Gerrish Twp,* 239 Mich App 380, 387; 608 NW2d 83 (2000).

In determining whether a charge imposed by a unit of government is a fee or a tax, a court must consider: (1) whether the charge serves a regulatory purpose rather than operates as a means of raising revenue; (2) whether the charge is proportionate to the necessary costs of the service to which it is related; and (3) whether the payor has the ability to refuse or limit its use of the service to which the charge is related. *Bolt, supra* at 161-162. These factors should be considered in their totality, and a weakness in one area does not mandate a particular finding. *Id.* at 167; *Graham v Kochville Twp,* 236 Mich App 141, 151; 599 NW2d 793 (1999).

Taxes have a primary purpose of raising revenue, while fees are usually in exchange for a service rendered or a benefit conferred. *Bolt, supra* at 162. The stated purpose of the intrastate fees is for "the administration of [the MCA]." MCL 478.1; MCL 478.2(1). The express purposes of the act are

to confer upon the [PSC] the power and authority and to make it its duty to supervise and regulate the transportation of property by motor vehicle for hire upon and over the public highways of this state in all matters whether specifically mentioned herein or not, so as to: (a) Relieve all future undue burdens and congestion on the highways arising by reason of the use of the highways by motor vehicles operated by motor carriers; (b) protect and conserve the highways and protect the safety and welfare of the traveling and shipping public in their use of the highways; (c) promote competitive and efficient transportation services; (d) meet the needs of motor carriers, shippers, receivers, and consumers; (e) allow a variety of quality, price, and service options to meet changing market demands and the diverse requirements of the shipping public; (f) allow the most productive use of equipment and energy resources; (g) provide the opportunity for efficient and well-managed motor carriers to earn adequate profits and attract capital; (h) promote intermodal transportation; (i) prevent unjust discrimination; (j) promote greater participation by minorities in the motor carrier system; (k) provide and maintain service to small communities and small shippers; (l) prevent evasion of this act through any device or arrangement; (m) promote entrepreneurship in the motor carrier industry by allowing greater contract carrier economic and entry flexibility; and (n) promote the use of jointly considered and initiated rates, classifications, divisions, allowances,

> charges, or rules of motor carriers under commission approved agreements. [MCL 475.2.[10]]

This language indicates the exactions are regulatory.

Taxes are designed to raise revenue for the general public, while a fee "confers benefits only upon the particular people who pay the fee, not the general public or even a portion of the public who do not pay the fee." *Graham, supra* at 151. In this case, in exchange for the fees, a motor carrier receives the right to operate its trucks in Michigan, and the fees are used to enforce the provisions of the act that carry out the above-listed purposes. Thus, there is a direct benefit to the one who pays the fees. We recognize that promoting and regulating safe use of the highways benefits the general public as well. However, a regulatory fee can have dual purposes and still maintain its regulatory characterization. As long as the primary purpose of a fee is regulatory in nature, the fee can also raise money provided that it is in support of the underlying regulatory purpose, *id.* at 151, and thus benefit the general public.

Plaintiffs' argument focuses on the second prong of the test, whether the fees are proportional to the cost of the services to which they relate. Plaintiffs assert that in 1982, when the fees were increased,[11] they became taxes because the amounts collected were in excess of the

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[10] Any purposes that related to economic regulation were preempted by § 601 of the FAAAA as of January 1, 1995, and the PSC ceased to enforce those regulations. *In re Motor Carrier Act, supra* at 300. However, the Legislature has yet to amend the MCA to reflect the federal preemption.

[11] 1982 PA 399 raised the fees in MCL 478.1 and MCL 478.2(1) to their current levels.

expenses related to the services. A fee must be proportionate to the cost of the regulation, but its amount is presumed reasonable unless its unreasonableness is established. *Id.* at 151. "[W]here revenue generated by a regulatory 'fee' exceeds the cost of regulation, the 'fee' is actually a tax in disguise." *Gorney v Madison Hgts,* 211 Mich App 265, 268; 535 NW2d 263 (1995).

In support of their contention, plaintiffs presented two affidavits and a senate fiscal report. We find the affidavits of minimal value in determining whether the fees are unreasonable. Neither of the affiants worked for the PSC and they could only offer their opinion regarding how the fees were spent. The senate fiscal report, created by a senate fiscal analyst, showed how the funds received by the PSC were utilized for fiscal years 1982-83 to 1994-95,[12] and one of the charts showed that there was a surplus nearly every year.[13]

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[12] Plaintiffs also assert that the report shows that the fees supported activities not related to the regulation of motor carriers because a portion was allocated to the State Police, Department of Commerce, and Department of Civil Service. However, it is the duty of the police to assist the PSC in enforcement of the MCA, MCL 479.13, and the Department of Commerce provides administrative support to the PSC that enables it to carry out its duties. It follows that the PSC would allocate a portion of the fees to them. In addition, the allocation of a very small portion of the PSC's revenues to the Department of Civil Service is mandated by the Legislature in accordance with the constitution to fund the civil service. Const 1963, art 11, § 5. The allocations to this department averaged only $23,000 each year when revenues ranged from $3.2 to $6.3 million.

[13] Plaintiffs present no evidence regarding the proportionality of the fees after 1995, when the PSC ceased any economic regulatory functions as mandated by § 601 of the FAAAA. Therefore, we have no basis on which to determine the proportionality of the fees after 1995.

However, defendants dispute the accuracy of the figures in the report. Defendants note that charts reflect the total fees collected, not just the fees collected pursuant to MCL 478.1 and MCL 478.2(1), and defendants got confirmation from the author of the report that appropriations to the Michigan Truck Safety Fund were not considered. Therefore, defendants contend that the excess amounts were distorted.

It is clear that the report on which plaintiffs rely included all fee revenues without excluding nonchallenged interstate fees collected pursuant to the SSRS and its predecessor system. Therefore, the surplus figures were distorted to some degree. Even without reducing the surplus figures, the aggregate excess during the thirteen years was only 11.7 percent, a relatively small percentage. The test is whether the fee is proportional, not whether it is equal, to the amount required to support the services it regulates. *Graham, supra* at 151. We conclude that the Court of Claims did not clearly err in finding that the fees were not "wholly disproportionate."

Lastly, plaintiffs argue that the exaction is not voluntary because a motor carrier cannot operate its trucks in Michigan without paying it. Defendants argue that a motor carrier has a choice with regard to what extent its trucks will have a presence in Michigan, and, therefore, the exaction is voluntary. While this is true in regard to the application fee, MCL 478.1, defendants' logic is erroneous in regard to the administration fee, MCL 478.2(1), because every vehicle licensed in Michigan must pay this fee irrespective of where it operates. Even if we were to view the exaction as more compulsory than voluntary, when the totality of factors are considered, we believe the exactions are most properly classified as regulatory fees.

Bolt, supra at 167; *Graham, supra* at 151. Therefore, the court did not err in granting defendants summary disposition on this issue.

VI

Plaintiffs next argue that the intrastate and interstate fees violate the Equal Protection Clause of the United States and Michigan Constitutions because they apply to "for-hire" motor carriers only and not to private motor carriers.[14] Both the federal and state constitutions guarantee equal protection, and afford similar protection. Const 1963, art 1, § 2; US Const, Am XIV, § 1; *Vargo v Sauer,* 457 Mich 49, 60; 576 NW2d 656 (1998). A court's ruling whether a statute violates equal protection is a question of law. *McDougall v Schanz,* 461 Mich 15, 24; 597 NW2d 148 (1999).

Legislative classifications that do not implicate a fundamental right or target a suspect class are presumed to be constitutional if they have a rational basis, and one who challenges such a statute has the burden of showing that it bears no rational relation to some independent and legitimate legislative end. *TIG Ins Co, Inc v Dep't of Treasury,* 464 Mich 548, 557; 629 NW2d 402 (2001); *Vargo, supra* at 60. Under the rational-basis test, a statute will ordinarily be sustained if it can be said to advance a legitimate governmental interest, even if the law seems to be unwise or works to the disadvantage of a particular

[14] Because we concluded that the fees are regulatory, plaintiffs additional argument, that the fees violate Michigan's Uniform Taxation Clause, is without merit.

group, or if the rationale seems to be tenuous. *People v Copper (After Remand),* 220 Mich App 368, 372-373; 559 NW2d 90 (1996). A legislative classification may not be set aside if any set of facts may reasonably be conceived to justify it. *Id.* at 373.

Before 1994, the fees were used to fund the economic- and safety-regulation of motor carriers. Motor carriers do not include private carriers. MCL 475.1(i). A private carrier is "any person engaged in the transportation of property by motor vehicle upon public highways where the transportation is incidental to, or in furtherance of, any commercial enterprise of the person, other than transportation." MCL 475.1(q). A "for hire" motor carrier is one that receives "remuneration or reward of any kind, paid or promised, either directly or indirectly." MCL 475.1(e). Thus, "for hire" motor carriers are engaged in the business of transportation.

The rationale behind the classification distinction may be supported by facts either known or reasonably assumed, even if those facts may be debatable. *TIG Ins, supra* at 557, citing *Crego v Coleman,* 463 Mich 248, 259-260; 615 NW2d 218 (2000). We believe it is reasonable to assume that motor carriers have larger fleets than private carriers, operate under competitive pressures, and operate more frequently than private carriers. We can surmise that these carriers are in need of being more closely scrutinized in order to protect the general public, which also uses the public highways; thus, the need for regulations and fees to cover their enforcement.

Even after economic regulation of the motor carriers ceased, as *In re Motor Carrier Act, supra* at 302, recognized, the PSC "still has significant regulatory obligations,"

including supervising and regulating the safety of motor-carrier operations, as well as the certification process. Therefore, the need for fees to support such regulations were not eliminated after the FAAAA was enacted. The same concerns that existed before still existed. Accordingly, we conclude that the Legislature's classification bore a rational relation to a legitimate state purpose, and the court did not err in granting defendants summary disposition.

VII

Finally, intervening plaintiffs argue that the intrastate fee imposed by MCL 478.2(1) violates the Commerce Clause because it burdens interstate commerce. Again, we disagree, but for a different reason than stated by the Court of Claims.

The Commerce Clause provides that Congress "shall have power . . . [t]o regulate commerce . . . among the several states. . . ." US Const, art I, § 8, cl 3. The "dormant Commerce Clause" "denies the States the power unjustifiably to discriminate against or burden the interstate flow of articles of commerce." *Oregon Waste Systems, Inc v Dep't of Environmental Quality of the State of Oregon,* 511 US 93, 98; 114 S Ct 1345; 128 L Ed 2d 13 (1994).

The Court of Claims held that the Commerce Clause was not implicated because the fee applied to intrastate carriers only. However, any tax or regulation that affects interstate travel, even if imposed solely on intrastate commerce, is subject to Commerce Clause analysis. *Citizens for Logical Alternatives & Responsible Environment v Clare Co Bd of Comm'rs,* 211 Mich App 494, 499; 536 NW2d 286 (1995). Because the fee is imposed on any

vehicle that operates intrastate pursuant to a certificate of authority, even if it also travels interstate, the fee affects interstate commerce, and thus, implicates the dormant Commerce Clause. Although the Court of Claims did not address this issue, our review is nevertheless proper because whether a statute violates the Commerce Clause is a question of law. *Gillette Co v Dep't of Treasury,* 198 Mich App 303, 311; 497 NW2d 595 (1993).

"A statute is presumed constitutional absent a clear showing to the contrary." *Caterpillar, Inc v Dep't of Treasury,* 440 Mich 400, 413; 488 NW2d 182 (1992). The test for determining whether a regulatory fee violates the Commerce Clause involves a two-tiered approach.[15] The first step is to determine whether the statute discriminates against interstate interests or merely regulates evenhandedly with only incidental effects upon interstate commerce. *Oregon Waste, supra* at 99. "'[D]iscrimination' simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Id.* The United States Supreme Court has recognized that there is no clear line separating the two categories. The critical consideration is the overall effect of the statute on both local and interstate activity. *Brown-Forman Distillers Corp v New York State Liquor Auth,* 476

[15] Intervening plaintiffs contend that the four-pronged test enunciated in *Complete Auto Transit, Inc v Brady,* 430 US 274, 279; 97 S Ct 1076; 51 L Ed 2d 326 (1977), and utilized in *American Trucking Ass'ns, Inc v Scheiner,* 483 US 266, 283; 107 S Ct 2829; 97 L Ed 2d 226 (1987), is applicable. However, this test is used to analyze the constitutionality of state-taxation statutes that tax interstate commerce itself, i.e., taxes for the privilege of doing business in the state, *Complete Auto, supra* at 279, not regulatory statutes.

US 573, 579; 106 S Ct 2080; 90 L Ed 2d 552 (1986). A state law will be invalidated if it "discriminate[s] against an article of commerce by reason of its origin or destination out of State." *C & A Carbone, Inc v Town of Clarkstown, New York,* 511 US 383, 390; 114 S Ct 1677; 128 L Ed 2d 399 (1994).

In making this determination, we must consider all the provisions of the challenged statute. MCL 478.2(1) requires that motor carriers that are licensed in Michigan and travel solely intrastate or travel both intrastate and interstate, a "mixed" carrier, must pay a fee of $100 for each vehicle. MCL 478.2(2) requires that motor carriers that are licensed in Michigan and travel solely interstate must also pay the $100 fee. Therefore, the regulatory fee is the same for all motor carriers licensed in Michigan, regardless of their final destination. It does not directly regulate interstate commerce, *Pike v Bruce Church, Inc,* 397 US 137, 142; 90 S Ct 844; 25 L Ed 2d 174 (1970), nor is economic protectionism at issue, *Arkansas Electric Coop Corp v Arkansas Pub Service Comm,* 461 US 375, 394; 103 S Ct 1905; 76 L Ed 2d 1 (1983).

Defendants assert that the majority of vehicles that pay the fee operate solely intrastate, which presumably leads to their conclusion that the effect on interstate commerce is minimal. However, the number of interstate vehicles burdened is inconsequential to a finding of discrimination. *New Energy Co of Indiana v Limbach,* 486 US 269, 276-277; 108 S Ct 1803; 100 L Ed 2d 302 (1988).

Intervening plaintiffs argue that the mixed carrier invariably will pay a higher per-mile fee than the carrier who operates solely intrastate. They assert that because the fee is a flat annual fee, in order to receive the greatest

benefit for the fee, a carrier would need to maximize its intrastate operations and this could potentially affect a carrier's economic decisions by discouraging an intrastate carrier from engaging in interstate commerce.

While this may be so, it is a matter of pure speculation. Intervening plaintiffs present no evidence that any trucking firm's route choices are affected by the imposition of the fee, only surmising that this could occur in the hypothetical. Only one affidavit was submitted by intervening plaintiffs, in which James Crozier, manager of licensing and fuel for intervening plaintiff TNT Holland Motor Express, Inc., stated that mixed carriers often top off their interstate loads with intrastate hauls or transport intrastate loads in between interstate hauls. However, he never averred that this was done only because of the fee imposed by MCL 478.2(1). Regardless of the $100 fee, topping off loads or adding intrastate hauls in between interstate ones is an economically efficient decision for the motor carriers. We do not find that the fee raises a significant barrier to participation in interstate trade. Any effect the fee has on interstate commerce is incidental and does not rise to the level of discrimination.

Having concluded that the statute regulates evenhandedly, it will be upheld unless the burden it imposes on interstate commerce is "clearly excessive in relation to the putative local benefits." *Pike, supra* at 142. Intervening plaintiffs do not contest that the statute serves a legitimate nondiscriminatory purpose, i.e., funding safety and related regulations. This is an exercise of the state's police power and serves a critical function in protecting the people who use Michigan's highways. Great deference is given to state legislation in the field of highway safety regulation and a strong presumption in favor of its validity

exists. *Raymond Motor Transportation, Inc v Rice,* 434 US 429, 443; 98 S Ct 787; 54 L Ed 2d 664 (1978). On the basis of the record before us, we cannot say that the burden imposed on interstate commerce by the $100 annual fee is clearly excessive in relation to Michigan's substantial interest in regulating safety on its highways. Therefore, we hold that MCL 478.2(1) does not violate the Commerce Clause. Accordingly, we affirm the Court of Claims' summary-disposition ruling in favor of defendants even though it reached its decision for the wrong reason. *Lavey, supra* at 250.

Affirmed.

/s/ Michael R. Smolenski
/s/ Jane E. Markey
/s/ Henry William Saad

APPENDIX B

STATE OF MICHIGAN

IN THE COURT OF CLAIMS

WESTLAKE TRANSPORTATION, INC., et al.,

Plaintiffs,

and

AMERICAN TRUCKING ASSOCIATIONS, INC. and TNT HOLLAND MOTOR EXPRESS, INC.,

Intervening Plaintiffs,

-vs-

MICHIGAN PUBLIC SERVICE COMMISSION, et al.,

Defendants. /

DOCKET NO. 95-15628-CM

OPINION

TROY CAB, INC., et al.,

Plaintiffs,

and

AMERICAN TRUCKING ASSOCIATIONS, INC. and TNT HOLLAND MOTOR EXPRESS, INC.,

Intervening Plaintiffs,

-vs-

STATE OF MICHIGAN, et al.,

Defendants. /

DOCKET NO. 95-15631-CM

OPINION

Before the Court in these consolidated class actions are three motions for partial summary disposition brought by Plaintiffs and Intervening Plaintiffs. All Plaintiffs collectively challenge the constitutionality and lawfulness of certain fees imposed on the trucking industry by Michigan statutes as administered by the Public Service Commission. The constitutional challenges are brought under both the federal and state constitutions, although those brought under Michigan fundamental law are not the subject of these motions. The nonconstitutional claims are predicated on federal statute and assert that the challenged fees violate such supreme law and thus must be enjoined.

The fees here challenged are mandated by Michigan's Motor Carrier Act (MCA or Act), 1933 PA 254 as amended, MCL 475.1, et seq; MSA 22.531, et seq. They are three in number and are delineated in two sections of article IV of the Act.

First there is the intrastate authority fee of $100.00 required when submitting to the Public Service Commission (PSC or Commission) an application for a certificate of authority or a permit, whether granted or not. That application fee is authorized by article IV, section 1 of the Act, MCL 478.1; MSA 22.560.

Second, section 2 of article IV, MCL 478.2; MSA 22.561, mandates annual fees of $100.00 for each motor vehicle operated by a motor carrier. Subsection (1) applies that requirement "for the administration of this act" to each vehicle used in intrastate service. Subsection (2) makes the same requirement applicable to each vehicle "registered in this state and operating entirely in interstate commerce" by a "motor carrier licensed in this state."

According to Plaintiffs, all three fees are unlawful because they, and especially the intrastate vehicle fee authorized by section 2(1), have been preempted by federal law. Further, they assert that the section 2(2) fee on each Michigan-registered vehicle operated entirely in interstate commerce by a Michigan-licensed motor carrier contravenes another provision of federal law that created the Single State Registration System for motor carriers in interstate commerce. Finally, they complain also that the section 2(1) fee imposed on vehicles operated in intrastate service offends the dormant Commerce Clause of the United States Constitution by discriminating against foreign motor carriers operating substantially in interstate commerce. The Court will treat each claim in order, beginning with that on which Plaintiffs primarily rely.

FEDERAL PREEMPTION

Federal preemption has its origin in the Supremacy Clause of US Const, art VI, which declares that the laws of the United States "shall be the supreme Law of the Land." However, federal provisions that invalidate state law must be narrowly tailored to support a presumption against preemption of state law. *Ryan* v. *Brunswick Corp,* 454 Mich 20, 27; 557 NW2d 541 (1997). State police powers are not superseded by federal provisions unless that is the clear and unequivocal intent of Congress. *Id.* This is especially true of state regulation of matters relating to health and safety. *Id.* The plain meaning of federal provisions must be given effect unless there is reason to think Congress intended a more restrictive reading. *Id,* p 28. Courts must seek the congressional intent from the text, structure and purpose of the federal provision as a whole. *Id.* Such considerations include "'the way in which

Congress intended the statute and its surrounding regulatory scheme to affect business, consumers, and the law.'" *Id,* quoting *Medtronic, Inc* v *Lohr,* 518 US ___; 116 S Ct 2240, 2251; 135 L Ed 2d 700 (1996).

The Federal Aviation Administration Authorization Act of 1994 (FAAAA), PL 103-305, contains § 601, which added sub-section (h), "Preemption of State economic regulation of motor carriers," to 49 USC 11501, subsequently recodified as 49 USC 14501.[1] By virtue of § 601, effective January 1, 1995, the FAAAA preempts state economic regulation of motor carriers by providing that a state "may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier . . . or any motor private carrier with respect to the transportation of property." 49 USC 11501 (h) (1), now recodified as 49 USC 14501 (c) (1). Such language clearly and expressly prohibits a state from enacting or enforcing laws related to economic aspects of the service provided by a motor carrier. See *Fitzpatrick* v *Simmons Airlines, Inc,* 218 Mich App 689, 691; 555 NW2d 479 (1996). The question then becomes whether Michigan's MCA is a law related to the price, route or service of a motor carrier. *Id.*

In *Morales* v *Trans World Airlines, Inc,* 504 US 374, 383; 112 S Ct 2031; 119 L Ed 2d 157 (1992), the United States Supreme Court concluded that, as used in a similar statute respecting the service of air carriers, the phrase

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[1] The entirety of this preemption provision is quoted in *In re Federal Preemption of Provisions of the Motor Carrier Act,* 223 Mich App 288, 293-294; 566 NW2d 299 (1997), lv den 458 Mich 852 (1998).

"relating to" expressed a broad preemptive congressional purpose. See *In re Federal Preemption of Provisions of the Motor Carrier Act,* 223 Mich App 288, 300-301; 566 NW2d 299 (1997), lv den 458 Mich 852 (1998); *Fitzpatrick,* supra. *Morales,* p 384, determined that state laws having a "connection with" or "reference to" airline services were "related to" the federal act for purposes of preemption. See *Fitzpatrick,* p 692. Indeed, *Morales,* p 386, rejected the view that the federal act's preemptive scope is limited to state laws specifically addressed to the air carrier industry, ruling instead that a state law may be preempted even if it is not designed to affect the area of preemption or its effect on that area is only indirect.[2] *Morales* held, p 391, that a state law requiring truth-in-advertising of air fares was related to the price and service of carriers and was therefore preempted by the federal act. Accord *American Airlines, Inc* v *Wolens,* 513 US 219; 115 S Ct 817; 130 L Ed 2d 715, 724-725 (1995): state consumer fraud law is preempted where applied to rates and services of airline frequent-flyer programs. Thus, the *Fitzpatrick* court held, supra, that fidelity to the broad interpretation rendered by the United States Supreme Court in *Morales* required the conclusion that judicial enforcement of the Michigan Civil

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[2] On the other hand, *Morales,* p 390, left room for state actions "too tenuous, remote, or peripheral" to have preemptive effect – without, however, explaining what was meant by those terms of qualification or how they should be applied to "a borderline question." Rather, *Morales* said only that "we express no views about where it would be appropriate to draw the line." *Id,* quoting *Shaw* v *Delta Air Lines, Inc,* 463 US 85, 100 n 21; 103 S Ct 2890; 77 L Ed 2d 490 (1983).

Rights Act to protect against employment discrimination in the air carrier industry was likewise preempted.[3]

If federal legislation preempts some applications of the Michigan Civil Rights Act to the employment practices of air carriers in this state, as ruled in *Fitzpatrick*, then a fortiori the same preemptive effect of the FAAAA must apply to any economic regulation imposed on motor carriers by the MCA.[4] Thus, the question is whether the Michigan requirements challenged here, viz., the fees authorized by art IV, §§ 1 & 2 of the MCA, are manifestations of economic regulation. If so, they are preempted. If not, they may still be preempted if related, no matter how indirectly, to the price, route or service of a motor carrier. See *Morales,* supra, p 386. However, where such indirect relationship is "too tenuous, remote, or peripheral" to

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[3] That ruling was recently limited by *Gilman* v *Northwest Airlines, Inc*, 230 Mich App 293, 303-304; ___ NW2d ___ (1998), which held that the same federal statute does not preempt the Michigan Civil Rights Act prohibitions of age and sex discrimination because those employee characteristics have no apparent connection or relation to an airline's routes, prices or services. *Gilman*, at 298-300, distinguished *Fitzpatrick,* supra, which had dealt only with height and weight discrimination in employment.

[4] The PSC acknowledges such preemptive effect on specific provisions of the MCA and has ceased to enforce those sections it considers preempted. Thus, the PSC no longer requires applicants for certificates of authority to present evidence that their proposed service will serve a required public purpose without creating excess service. It no longer mandates that carriers avoid predatory pricing practices or file tariff schedules. Similarly, it no longer exercises its authority under the MCA to determine reasonable and sufficient rates, fares, charges and classifications or to penalize unlawful discrimination. See *In re Federal Preemption*, supra, p 297.

implicate preemption, the state legislation may be permitted to stand unaffected by the national policy of economic deregulation. *Id,* p 390.

While the tenuousness or peripherality of an "indirect relationship" has not been expressly addressed, there are some indications that it need not be particularly remote from the preempted field. For instance, in *American Airlines* v *Wolens,* supra, 130 L Ed 2d at 726 n 5, the United States Supreme Court endorsed the view that "the ban on enacting or enforcing any [state] law 'relating to rates, routes, or services' is most sensibly read, in light of the [federal law's] overarching deregulatory purpose, to mean 'States may not seek to impose their own public policies or theories of competition or regulation on the operation of an air carrier.'" That view was prefigured in *Morales,* supra, p 378, which recognized that the federal law was designed to place "maximum reliance on competitive market forces" under a uniform national regime of economic deregulation, i.e., "[t]o ensure that the States would not undo federal deregulation with regulation of their own." Thus, that federal enactment, as *American Airlines* stated at 728, "stops States from imposing their own substantive standards with respect to rates, routes, or services." That would suggest that the fees challenged here are not preempted by § 601 since they impose on motor carriers no particular "substantive standards" of competition or regulation.

The Commission's determinations regarding the effect of § 601 on the MCA were summarized recently in *In re Federal Preemption,* supra, p 295:

> "The PSC concluded that § 601 preempts only regulatory provisions concerning price, routes, and service – the essence of economic regulation.

> The PSC found it had substantial residual regulatory authority, including regulatory authority over matters such as safety. The PSC further concluded that it should continue a certification process (albeit, a 'streamlined' certification process) for intrastate motor carriers and that it could and should continue to assess statutorily mandated fees. . . . Since issuing its decisions, the PSC has ceased enforcing those provisions of the Motor Carrier Act that it concluded had been preempted."

Thus federal preemption under § 601 and the Commission's decisions applying that federal principle to the MCA have substantially altered the regulatory framework for the trucking industry in Michigan. *Id,* p 298.

Even so, the court in *In re Federal preemption*, p 301, ruled that much of the MCA survives the federal preemption statute:

> "[I]t is clear and unambiguous from the language of § 601 that the congressional intent was not to preempt all state regulation of the trucking industry. Section 601 expressly excepts from its preemptive effect significant aspects of regulation, including safety regulation, regulation of size and weight of vehicles, regulation of insurance requirements, and regulation of the transportation of household goods. If the language of a statute is clear and unambiguous, the plain meaning of the statute reflects the legislative intent. . . . Furthermore, the House Conference Report indicates that 'economic regulation' is intended to be preempted and that states retain their authority to regulate various aspects of the transportation industry. See H R Conf Rep No 677, 103d Cong, 2d Sess, pp 84-85. . . . The

> argument that Congress intended to preempt the entire field of regulation of motor carriers fails in the face of the language of the legislation and its history. The PSC's determination that § 601 was intended to preempt only economic regulation is consistent with the language and history of the legislation."

See also *Michigan Trucking Ass'n* v *Public Service Comm (On Remand)*, 225 Mich App 424, 427-429; 571 NW2d 734 (1997).

Significantly, the *Federal Preemption* court, pp 302-303, also rejected the contention reiterated by Plaintiffs here that federal preemption of all economic regulation means that the fees assessed under the MCA to finance that regulation must likewise be preempted, especially since the primary focus of the MCA had traditionally been economic regulation of the trucking industry:

> "Section 601 did not preempt the entire Motor Carrier Act. Section 601 of the FAAAA does not in its words indicate an intent to preempt fee provisions such as those challenged by these appellants. The legislative history reflects a contrary intent. The House Conference Report states that nothing in the legislation is intended to change the application of state tax laws to motor carriers. H R Conf Rep No 677, supra, p 85.
>
> "The PSC still has significant regulatory obligations. For example, the PSC must supervise and regulate the safety of motor carrier operations. MCL 479.41; MSA 22.587(1). There is still a certification process. It follows that the fees for obtaining a certificate of authority, MCL 478.1; MSA 22.560, for protesting an application for a certificate, MCL 478.1a; MSA 22.560(1), and for

> administering the act, MCL 478.2(1); MSA 22.561(1), are unaffected by the preemptive effect of § 601. In fact, because the PSC is not using its resources to enforce preempted portions of the Motor Carrier Act, the fees collected by the PSC are not related to the preempted provisions and rules. Indeed, appellants . . . have not shown that the cost of the PSC's operations has ever been totally funded by the fees its [sic] collects, and they have not provided any reason to believe that the fees collected were or can be used only for what is now preempted economic regulations."

The Court of Appeals has spoken. In two published decisions, *Federal Preemption* and *Michigan Trucking Ass'n,* supra, it has ruled that § 601 did not preempt the MCA in its entirety, and least of all in matters of safety regulation and the application and vehicle fees challenged here. That must be this Court's judgment as well. In short, Plaintiffs' motion based on the federal preemption claim must be denied.

SINGLE STATE REGISTRATION SYSTEM

Congress has provided for a Single State Registration System (SSRS) that requires a motor carrier having interstate authority to register annually with only one of the states among those it is authorized to provide transportation service. Under 49 USC 11506, the SSRS is deemed to satisfy the registration requirements of all other states, except for a nominal fee "not to exceed $10 per vehicle" that is permitted annually to each participating state. The same section prohibits as an unreasonable burden on interstate commerce any other fee not in accordance with that specifically authorized.

Plaintiffs complain that the MCA violates the SSRS by its art IV, § 2(2) requirement of a $100.00 annual fee per vehicle that is registered in Michigan and operated entirely in interstate commerce by a Michigan-licensed motor carrier. Alternatively, they contend that § 2(2) is effectively preempted by the SSRS mandate that no participating state, other than the registering state, exact more than an annual fee of $10.00 per vehicle operated in interstate commerce. In either case, this MCA vehicle fee is supposedly rendered a nullity by the SSRS.

Of course, Michigan's MCA "applies to entities engaged in interstate commerce only to the extent it is consistent with federal law. MCL 476.12; MSA 22.545." *Federal Preemption,* supra, p 294. Here, however, there is no inconsistency. Section 2(2) of article IV of the MCA applies only to vehicles registered in Michigan by Michigan-licensed motor carriers, i.e., where Michigan is the "registering state." The SSRS fee system places a $10.00 annual vehicle fee limit on only the "participating states," however, not on the "registering state." The SSRS neither prohibits nor preempts the Act's § 2(2) vehicle fee.

Moreover, the MCA expressly accommodates the fee system mandated by the SSRS. In article IV, section 7, MCL 478.7; MSA 22.566, the Act provides for the registration of and fees paid by carriers engaged in interstate transportation pursuant to the SSRS and any other reciprocal multistate agreement. In particular, subsection (4) mandates that "[t]he annual fee levied on each interstate or foreign motor carrier vehicle operated in this state and licensed in another state or province of Canada shall be $10.00." Obviously, that is perfectly consistent with the annual $10.00 vehicle fee permitted each participating

state by the SSRS. Plaintiffs' motion must therefore be denied.

COMMERCE CLAUSE

The dormant Commerce Clause of US Const, art I, § 8, prohibits a state from erecting barriers to the national regime of free trade by enacting tax or fee requirements that constitute an undue burden on or discrimination against interstate commerce. Plaintiffs assert that the MCA art IV, § 2(1) vehicle fee for intrastate Michigan transportation impermissibly discriminates against interstate motor carriers by favoring domestic carriers whose business is exclusively intrastate. This is supposed to be so essentially because domestic intrastate carriers necessarily derive a disproportionately greater financial advantage for their § 2(1) fees than do those interstate carriers that may want to make an occasional intrastate haul while their vehicles are visiting Michigan. The Court is not persuaded that the choice of whether to engage primarily in interstate rather than exclusively in intrastate transportation, made by private businesses competing in the free marketplace, affects Commerce Clause concerns. And it surely cannot result in the invalidation of § 2(1) on Commerce Clause grounds.

Plaintiffs cite *American Trucking Ass'ns* v *Scheiner*, 483 US 266, 282; 107 S Ct 2829; 97 L Ed 2d 226 (1987), for its condemnation of "flat taxes" whose unapportioned measure results in discrimination against some participants in interstate commerce in a manner that contradicts the purpose of the Commerce Clause. As *Goldberg* v *Sweet*, 488 US 252, 266; 109 S Ct 582; 102 L Ed 2d 607 (1989), explained, "In *Scheiner*, we held that Pennsylvania's flat

taxes on the operation of all trucks on Pennsylvania highways imposed a disproportionate burden on interstate trucks, as compared with intrastate trucks, because the interstate trucks traveled fewer miles per year on Pennsylvania highways." Here, the MCA intrastate vehicle fee is alleged to be just such a "flat tax" and therefore impermissible under the principles enunciated in *Scheiner.* Plaintiffs' reliance on *Scheiner* is misplaced.

First, the taxes at issue in that case were exacted for the purpose of financing roadway upkeep based on highway usage, but the flat tax on the privilege of operating on the state roads failed to take into account varying degrees of such usage by the different carriers. Here, however, the fee exacted is regulatory and intended "for administering the act." *Federal Preemption,* supra, p 302. Such state regulation as remains after federal preemption, including regulation of vehicular size and weight, insurance requirements and safety standards, is not amenable to a fee structure based on apportionment by usage rates. And the fee itself is plainly not a tax on the privilege of doing business in Michigan.[5] Thus, Commerce Clause interests are not affected by the intrastate vehicle fee.

Second, the flat taxes in *Scheiner* applied across the board to any vehicle traveling the state's highways,

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[5] It might also be pointed out that there is a distinction between a tax and a fee, although the *Scheiner* Court did not adhere to it. Neither did the Court of Appeals in *Federal Preemption,* supra at 302, quoted above in context, which spoke of the MCA fees as if they were nothing different from "the application of state *tax laws* to motor carriers." (Emphasis added.)

whereas the fee here is exacted only of those vehicles, foreign or domestic, that the carrier chooses to operate in point-to-point intrastate Michigan service. The interest furthered by that fee, viz., ensuring that vehicles and carriers operating on Michigan highways in intrastate service comply with MCA safety and fitness norms, is an exercise of state police power and the legitimate expression of the state's concern that the welfare of its citizens be protected. That interest plainly does not have a prejudicial effect on interstate commerce and thus does not impact the Commerce Clause.

Third, *Scheiner* itself provides ample reason to think its principles are inapplicable to the intrastate vehicle fee of the MCA. There the Court found dispositive its precedents holding "that the Commerce Clause prohibits a State from imposing a heavier tax burden on out-of-state businesses that compete in an interstate market than it imposes on its own residents who also engage in commerce among States." *Id,* p 282 (footnote deleted). Stated more plainly, this principle applies only where foreign and domestic carriers are all competing in interstate commerce. Thus, Michigan cannot, consistent with the Commerce Clause, tax foreign carriers more heavily than domestic carriers engaged in interstate competition. It can, however, impose the identical vehicle fee of $100.00, as authorized by § 2(1), on all carriers that opt to provide intrastate Michigan transportation services. That fee does not implicate Commerce Clause concerns.

In short, the fee burden here does not fall more heavily on foreign carriers than on Michigan carriers engaged in interstate commerce. It is, rather, the same for all carriers that choose to provide intrastate Michigan haulage services either exclusively or in addition to

interstate operations. As was said in *Scheiner,* p 283, "the Commerce Clause is not offended when state boundaries are economically irrelevant." That is surely true of the § 2(1) intrastate vehicle fee based on Michigan boundaries, which have no economic relevance for interstate traffic. The motion challenging that fee on Commerce Clause grounds must therefore be denied.

The Court determines that Plaintiffs' motions for partial summary disposition are meritless. All three motions must therefore be denied. An order consistent with this opinion may enter upon its proper presentation.

/s/ James R. Giddings
JAMES R. GIDDINGS
Circuit Judge

DATED: Oct. 13, 1998

STATE OF MICHIGAN

IN THE COURT OF CLAIMS

WESTLAKE TRANSPORTATION, INC., et al,

Plaintiffs,

v

MICHIGAN PUBLIC SERVICE COMMISSION, et al

Defendants. /

File No. **95-15628 CM**
Hon. James R. Giddings

TROY CAB, INC., et al,

Plaintiffs,

v

STATE OF MICHIGAN, et al

Defendants. /

File No. **94-15631 CM**
Hon. James R. Giddings

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ORDER

At a session of said Court, held in the Court of Claims on: November 12, 1998

PRESENT: _____

For the reasons stated in its October 13, 1998 Opinion, this Court hereby DENIES in their entirety Plaintiffs' First and Second Motions for Partial Summary Disposition filed on June 22, 1995 and June 22, 1995, respectively, and Intervening Plaintiff's Motion for Summary Disposition filed on June 30, 1995.

James R. Giddings
HONORABLE JAMES R. GIDDINGS
COURT OF CLAIMS JUDGE

A TRUE COPY
CLERK OF THE COURT
30TH JUDICIAL CIRCUIT COURT

STATE OF MICHIGAN

IN THE COURT OF CLAIMS

WESTLAKE TRANSPORTATION, INC., et al.,

Plaintiffs,

and

AMERICAN TRUCKING ASSOCIATIONS, INC. and TNT HOLLAND MOTOR EXPRESS, INC.,

Intervening Plaintiffs,

-vs-

MICHIGAN PUBLIC SERVICE COMMISSION, et al.

Defendants. /

DOCKET NO. 95-15628-CM

TROY CAB, INC., et al.,

Plaintiffs,

and

AMERICAN TRUCKING ASSOCIATIONS, INC. and TNT HOLLAND MOTOR EXPRESS, INC.,

Intervening Plaintiffs,

-vs-

STATE OF MICHIGAN, et al.,

Defendants. /

DOCKET NO. 95-15631-CM

ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY DISPOSITION

At a session of said Court held in the City of Lansing on the 30th day of December, 1998.

PRESENT: HONORABLE JAMES R. GIDDINGS
Circuit Judge

The Court having entered on November 12, 1998 its Order denying Plaintiffs' First and Second Motions for Partial Summary Disposition and Intervening Plaintiffs' Motion for Summary Disposition for the reasons given in the Court's written Opinion of October 13, 1998; Defendants having renewed their Motion for Summary Disposition of all claims in their entirety by filing two supplemental briefs in support; the Court having reviewed the motion and the briefs of the parties in both consolidated actions having heard oral argument on the motion, and being fully advised in the premises;

NOW, THEREFORE, IT IS HEREBY ORDERED AND ADJUDGED that Defendants' Motion for Summary Disposition is GRANTED. Plaintiffs and Intervening Plaintiffs in each case cannot prevail as a matter of law and both actions must therefore be DISMISSED for the reasons stated in Defendants' Second Supplemental Brief in Support of Defendants' Motion for Summary Disposition filed on November 10, 1998, and in the other briefs referred to therein.

IT IS SO ORDERED.

/s/ James R. Giddings
JAMES R. GIDDINGS
Circuit Judge

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CLERK OF THE COURT
30TH JUDICIAL CIRCUIT COURT

STATE OF MICHIGAN

IN THE COURT OF CLAIMS

WESTLAKE TRANSPORTATION, INC., et al.,

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Defendants. /

DOCKET NO. 95-15628-CM

TROY CAB, INC., et al.,

Plaintiffs,

and

AMERICAN TRUCKING ASSOCIATIONS, INC. and TNT HOLLAND MOTOR EXPRESS, INC.,

Intervening Plaintiffs,

-vs-

STATE OF MICHIGAN, et al.,

Defendants. /

DOCKET NO. 95-15631-CM

ORDER DENYING PLAINTIFFS' MOTION FOR RECONSIDERATION

At a session of said Court held in the City of Lansing on the 7th day of March, 2000.

PRESENT: HONORABLE JAMES R. GIDDINGS
Circuit Judge

The Court having entered on December 30, 1998 an order granting Defendants' renewed Motion for Summary Disposition and dismissing these consolidated complaints challenging the constitutionality of certain fees imposed on the trucking industry by Michigan law as administered by the Public Service Commission; Plaintiffs having filed a Motion for Reconsideration and brief in support; the Court having reviewed the motion and brief, and being fully advised in the premises;

NOW, THEREFORE, IT IS HEREBY ORDERED AND ADJUDGED that Plaintiffs' Motion for Reconsideration is DENIED, because it does not appear that the order of dismissal was erroneously entered. The motion does little more than rehash issues presented and decided earlier. "[A] motion for rehearing or reconsideration which merely presents the same issues ruled on by the court, either expressly or by reasonable implication, will not be granted." MCR 2.119(F) (3). Plaintiffs fail to demonstrate palpable error by which the Court has been misled. *Id.* Thus, there is no need to address each of Plaintiffs' renewed issues. The Court will comment, however, on the salient problems presented in the motion, principally those challenging the constitutionality of certain fees, identified and cited in the Court's written opinion of October 13, 1998, imposed on for-hire motor carriers by the Motor Carrier Act (MCA).

There is a presumption favoring the constitutionality of statutes. *McDougall* v *Schanz,* 461 Mich 15, 24; 597 NW2d 148 (1999); *H J Tucker & Associates, Inc* v *Allied Chucker & Engineering Co.* 234 Mich App 550, 556; 595 NW2d 176 (1999), lv den 461 Mich 944 (2000). Not only are statutes presumed constitutional but Michigan courts also have a duty to construe a statute as constitutional unless its unconstitutionality is clearly apparent. *Mahaffey* v *Attorney General,* 222 Mich App 325, 344; 564 NW2d 104 (1997). A successful challenge to the facial constitutionality of a statute must establish that there exist no circumstances under which the statute would be valid. *Council of Organizations & Others for Education About Parochiaid* v *Governor,* 455 Mich 557, 568 & 602; 566 NW2d 208 (1997), quoting *United States* v *Salerno,* 481 US 739, 745; 107 S Ct 2095; 95 L Ed 2d 697 (1987). Indeed, an interpretation of the Constitution that does not result in a statute being found invalid is preferred to one that does. *House Speaker* v *Governor,* 443 Mich 560, 585; 506 NW2d 190 (1993), quoting *Marbury* v *Madison,* 5 US (1 Cranch) 137, 175; 2 L Ed 60 (1803). Plaintiffs fail to overcome the presumption.

Accordingly, it is the Court's duty to determine whether the MCA is capable of *any* construction that would make it constitutional. *Michigan United Conservation Club* v *Dep't of Treasury,* ___ Mich App ___; ___ NW2d ___ (opinion by Judge Markey, docket 208429, issued December 10, 1999), slip opinion, p 4. Are the fees imposed on for-hire carriers by the MCA at odds with the plain language of the Constitution? The Court has already determined, by the order of December 30, 1998, that they are not. The same conclusion must prevail here.

Plaintiffs assert first that these fees are invalid and the Court must order that they be at least partially refunded because they are actually taxes that have not been properly adopted in accordance with the constitutional requirements. They contend that the fees are disproportionate to the necessary costs of regulating for-hire motor carriers, and that the moneys collected from the fees are largely used as general revenue to finance other aspects of government activity. They also point to *Yellow Freight System, Inc* v *Michigan,* 231 Mich App 194, 208; 585 NW2d 762 (1998), where the Court of Appeals opined that revenue collection "in the form of a fee" imposed by the MCA should be treated like "state tax cases" for purposes of 42 USC 1983 and the rule enunciated in *Nat'l Private Truck Council, Inc* v *Oklahoma Tax Comm,* 515 US 582; 115 S Ct 2351; 132 L Ed 2d 509 (1995). This Court, they suggest, should therefore treat these fees as if they were taxes. The Court disagrees.

There is no bright-line test for distinguishing a tax from a fee. *Bolt* v *City of Lansing,* 459 Mich 152, 160; 587 NW2d 264 (1998); *Graham* v *Kochville Twp,* 236 Mich App 141, 150; 599 NW2d 793 (1999). Whether the charges exacted for these applications and renewals of authority and for truck decals are properly characterized as fees or taxes requires consideration of several factors. *Bolt* at 161. No single factor is determinative of the distinction; rather, all factors should be considered in determining whether together they preponderate in one direction or the other. *Id.* at 163-169. Accord *Graham* at 151, citing *Bolt* at 167, n 16: "[T]hese criteria are not to be considered in isolation, but rather in their totality, such that a weakness in one area would not necessarily mandate a finding that the charge at issue is not a fee."

Generally, a fee is paid for a service rendered or a benefit conferred where there is "some reasonable relationship" between the amount of the fee and the value of the service or benefit, whereas a tax is meant simply to raise revenue. *Bolt* at 161, quoting *Saginaw Co* v *John Sexton Corp of Michigan,* 232 Mich. App 202, 210; 591 NW2d 52 (1998). Exactions imposed primarily for public rather than private purposes are taxes; the revenue raised by taxes inures to the benefit of all, as opposed to fees paid by a few for benefits that inure to the persons or group assessed. *Id.,* citing *Bray* v *Dep't of State,* 418 Mich 149, 162; 341 NW2d 92 (1983), which quoted *Dukesherer Farms, Inc* v *Dep't of Agriculture (After Remand),* 405 Mich 1, 15-16; 273 NW2d 877 (1979).[1]

Three criteria apply to the distinction between a fee and a tax. The first criterion requires that a fee serve a regulatory rather than a revenue-raising purpose. *Bolt, supra,* citing *Merrelli* v *St Clair Shores* 355 Mich 575, 583-584; 96 NW2d 144 (1959), which quoted *Vernor* v *Secretary of State,* 179 Mich 157, 167-170; 146 NW 338 (1914).[2] The

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[1] This "factor" can be confusing if it is mistakenly thought to require that the moneys acquired from fees never be used to benefit the public. On the contrary, regulatory fees such as those at issue here are an exercise of the police power of the community whose purpose is the protection of the public health, safety and welfare. Indeed, "such moneys are incidental to the accomplishment of the primary purpose of guarding the public." *Merrelli* v *St Clair Shores,* 355 Mich 575, 583; 96 NW2d 144 (1959).

[2] Citing the same precedent, *Graham, supra,* recently qualified the first criterion by saying that a fee can have a secondary revenue-raising purpose without having to treat the fee as a tax: "While a fee must serve a primary regulatory purpose, it can also raise money as long as it is in support of the underlying regulatory purpose." That principle applies here.

second criterion requires that a fee be proportionate to the necessary cost of the benefit or service provided. *Id.* at 162, citing *Merrelli, supra,* and *Bray, supra* at 160, and quoting *Vernor, supra* at 167. The third criterion requires that a fee be characterized by some degree of "voluntariness" in that those who pay it be able to refuse or limit their use of the benefit or service. *Id.* at 162-163, citing *Ripperger* v *Grand Rapids,* 338 Mich 682, 686; 62 NW2d 585 (1954), which quoted *Jones* v *Detroit Water Comm'rs,* 34 Mich 273, 275 (1876).[3]

The challenged fees are not unlawful taxes. As was summarized in *Bolt, supra* at 162, quoting *Vernor, supra* at 167:

> "'To be sustained [as a regulatory fee], the act we are here considering must be one for regulation only, and not as a means of producing revenue. Such a measure will be upheld by the courts

[3] But see *Bolt* v *City of Lansing (On Remand),* 238 Mich App 37, 45-48; ___ NW2d ___ (1999), where it appears that confusion over the historic import of these factors persists. This Court agrees with Judge Markman's dissent, pp 67-71, pointing out that the Supreme Court in *Bolt, supra,* relied on long-established precedent in distinguishing fees from taxes and did not create some "new" test of the difference between them. This Court also agrees with the dissent, at 71, when it says, "in virtually all such disputes, the application of a 'totality of factors' test will inevitably entail some uncertainty in terms of the ultimate result, while also affording both sides some measure of reasonable argument." That, however, puts the Markman dissent in close proximity to that in *Bolt* at 176, where Justice Boyle expressed strong doubt, shared by this Court, that the "test" is straightforward and consistent enough to be applied with any degree of precision to this "legal conundrum." But perhaps that should go without saying where the test is admittedly not one of "bright lines" – which is, incidentally, one reason for the *Bolt* decision having split 4:3.

> when plainly intended as a police regulation, and the revenue derived therefrom is not disproportionate to the cost of issuing the license, and the regulation of the business to which it applies.'" (Brackets in original.)

In *Merrelli, supra* at 583-584, quoting *Vernor, supra* at 168, the proportionality of a fee was linked to its presumed reasonability:

> "'[W]hat is a reasonable fee must depend largely upon the sound discretion of the legislature, having reference to all the circumstances and necessities of the case. It will be presumed that the amount of the fee is reasonable, unless the contrary appears upon the face of the law itself, or is established by proper evidence. . . .
>
> "'In determining whether a fee required for a license is excessive or not, the absence or amount of regulatory provisions and the nature of the subject of regulation should be considered, and, if the amount is wholly out of proportion to the expense involved, it will be declared a tax. * * * '" (Cites deleted.)

As *Vernor* also said at 168, in important language not quoted in *Merrelli,* "If revenue is incidentally derived which is not so disproportionate as to make the fee charged unreasonable, there can be no objection." Accord *Graham, supra* (see footnote 2). That is the case here.

The Court determines that the MCA fees are not "wholly out of proportion to the expense involved" in the Commission's regulation of the motor carrier industry. The revenue incidentally derived therefrom, even if in excess of the necessary costs of regulation, is not so disproportionate as to render these fees unreasonable – especially since

they are supportive of the underlying regulatory purpose. *Graham, supra.* Payment of the fees is not compulsory inasmuch as carriers choose just how much of a presence in Michigan, if any, they want their trucks to have. Consistent with the criteria set out in *Bolt, supra* at 161-162, these fees serve a regulatory purpose, are proportionate to the necessary costs of the regulatory service and are voluntary. Compare *Graham, supra* at 152-156. The Court must therefore defer to the sound discretion of the legislature in deciding what MCA fees would be reasonable. In short, these fees are not taxes and Plaintiffs are therefore not entitled to a refund.

Second, Plaintiffs assert that the challenged fees are facially infirm for their disparate treatment of for-hire motor carriers relative to all other motor carriers that regularly travel Michigan highways. On this view, since the latter group is not subject to the imposition of MCA fees there can be no rational basis for such dissimilar treatment of motor carriers. Saying that "[t]he classification made by the [MCA] is arbitrary and discriminates against for-hire motor carriers," Plaintiffs complain that the MCA denies them equal protection of the law by requiring that only they, and not private or exempt carriers, pay for police enforcement of safety provisions applicable to the entire trucking industry. Indeed, "There is no difference between for-hire motor carriers, on the one hand, and private and exempt carriers, on the other hand, in terms of the safety concerns that they pose to the traveling public . . . [or] of the amount of police enforcement required to see that they are complying with the law . . . [or] of the amount of damage caused by such carriers to the state and federal highways." Pointing out that the for-hire carriers "have exactly the same interest as private

carriers in operating their equipment in a safe fashion," Plaintiffs conclude that imposition of these fees on only the former must be "irrational," "arbitrary" and "discriminatory," and therefore must offend equal protection of the law principles.

This view fails to see, however, that the process of drawing lines and distinguishing between kinds of motor carriers for regulatory purposes is a legislative task of identifying priorities, weighing relevant considerations and choosing among competing alternatives. Equal protection guarantees do not require that such distinctions be ideal: "'[T]he drawing of lines that create distinctions is peculiarly a legislative task and an unavoidable one. Perfection in making the necessary classifications is neither possible nor necessary.'" *O'Donnell* v *Farm Mutual Automobile Ins Co,* 404 Mich 524, 542; 273 NW2d 829 (1979), app dis 444 US 803 (1980), quoting *Massachusetts Bd of Retirement* v *Murgia,* 427 US 307, 314; 96 S Ct 2562; 49 L Ed 2d 520 (1976), and *Ohio Bureau of Employment Services* v *Hodory,* 431 US 471, 489; 97 S Ct 1898; 52 L Ed 2d 513 (1977).

Nor does equal protection require the legislature to deal with every aspect of the problems presented in motor-carrier regulation at the same time. A statute is not unconstitutional merely because it might have gone further than it did by solving all such problems at once. The legislature need not simultaneously "strike at all evils" associated with such regulatory problems; rather, the measure adopted "'may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind.'" *Id.* at 543, quoting *Katzenbach* v *Morgan,* 384 US 641, 657; 86 S Ct 1717; 16

L Ed 2d 828 (1966), and *New Orleans* v *Dukes,* 427 US 297, 305; 96 S Ct 2513; 49 L Ed 2d 511 (1976). All that need be shown is that there was a rational basis for the particular lines that were drawn. If so, the legislative judgment must then be sustained. *Id.* "The mere fact that the Legislature has chosen to draw a distinction; between for-hire and private motor carriers for purposes of this kind of regulation "does not mean that [the MCA] is unconstitutional." *Id.* at 547. See also *In re Forfeiture of $109,901,* 210 Mich App 191, 197; 533 NW2d 328 (1995).

Plaintiffs are not members of a protected class and fundamental rights are not implicated in these consolidated actions. This equal protection claim must therefore be assessed by means of a rational basis test. *Saginaw Co, supra* at 222-223, citing *Yaldo* v *North Pointe Ins Co,* 457 Mich 341, 349; 578 NW2d 274 (1998). Michigan courts must uphold the challenged statute where it furthers a legitimate governmental interest and the classification is rationally related to achieving that interest. *Id.* at 223. This requires only that the legislation's distinctions bear a reasonable relationship to a permissible legislative objective. *Pioneer State Mutual Ins Co* v *Allstate Ins Co.* 417 Mich 590, 599-600; 339 NW2d 470 (1983). There need only be some reason for thinking that the means chosen, i.e., the statute's distinctions, are likely to further the legislature's goals. *Doe* v *Dep't of Social Services,* 439 Mich 650, 662; 487 NW2d 116 (1992), citing *Shavers* v *Attorney General,* 402 Mich 554, 613; 267 NW2d 72 (1978), cert den 442 US 934 (1978).

The application and renewal fee and the intrastate and interstate decal fees required by the MCA reflect the legislature's intent to regulate the non-preempted aspects

of the for-hire motor carrier industry remaining after federal preemption of the economic aspects. It surely was not unreasonable for legislators to think that industry in a materially different position relative to the public interest than private carriers. That distinction rationally comports with the legislative intent to subject the former to regulation for the sake of guarding the public. Whether that means to securing the public interest actually works out as intended is another question that is of no concern to equal protection analysis. *O'Donnell, supra* at 549.

Further, the legislature's statutory distinction between commercial and private motor carriers for the purpose of exacting these fees is a valid classification designed to address the specific concerns of this legislation. The objective is without doubt a legitimate state interest, and there is nothing unreasonable or irrational about the classification scheme's relationship to that goal. The fees are not arbitrary since they represent a reasonable effort by government to assure that the public is adequately protected against potential dangers posed by for-hire carriers. Although the lines drawn by the legislature in making the MCA applicable only to commercial carriers may be imperfect, that is not sufficient to render them unconstitutional. "'That the legislative solution appears undesirable, unfair, unjust or inhumane does not of itself empower a court to override the legislature and substitute its own solution.'" *Doe, supra* at 681, quoting *Manistee Bank & Trust Co* v *McGowan,* 394 Mich 655,

666-667; 232 NW2d 636 (1975). In short, the challenged fees do not violate equal protection of the law.[4]

The Court will address next one facet of the federal preemption issue[5] that inadvertently went untreated in the written opinion of October 13, 1998. There, at 11, this Court ruled that the Single State Registration System (SSRS), 49 USC 11506, now 49 USC 14504, neither preempted nor prohibited the § 2(2) per-vehicle interstate decal fee of $100 imposed by the MCA. The Court reaffirms that ruling and now considers Plaintiffs' contention that, even if that is correct (which they dispute), the same fee had been preempted or prohibited long before Congress adopted the SSRS in 1991 and the Interstate Commerce Commission (ICC) implemented it in 1994. Specifically, they argue that certain pre-SSRS regulations of the ICC had imposed an absolute limit, "not to exceed" $5 at one time and $10 later, on all interstate decal fees, including those required by the state that registers and licenses a motor carrier's vehicles. This Court disagrees.

Neither before implementation of the SSRS nor after did the Congress or the ICC impose a ceiling on the fee that a registration state may charge for per-vehicle interstate decals. The fee limits that were imposed applied only to states where the vehicles were not based and registered.

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[4] Given the Court's disposition of the first two issues, there is no need to treat Plaintiffs' third issue based on 42 USC 1983. That is so because § 1983 is merely a vehicle for the vindication of viable claims, and here no such claim remains.

[5] For a summary of preemption principles, see *Walker* v *Johnson & Johnson Vision Products, Inc,* 217 Mich App 705, 710-713; 552 NW2d 679 (1996).

The case vaunted by Plaintiffs as providing "an excellent educational discussion of federal law both prior to and after implementation of the SSRS," *Nat'l Ass'n of Regulatory Utility Comm'rs* v *Interstate Commerce Comm.*, 309 US App DC 325; 41 F3d 721, 724 (1994), says nothing different.[6] Indeed, it does not even touch on the issue but does stress that it was the congressional intent in establishing the SSRS not only "'to benefit the interstate carriers by eliminating unnecessary compliance burdens'" but also "'to preserve revenues for the states [like Michigan] which had participated in the bingo [card/stamp] program'" of interstate reciprocity under regulation by the ICC. *Id.*, quoting H R Conf Rep No 102-404, 102d Cong, 1st Sess, 437 (1991).

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[6] As to the SSRS, the same case points out at 725 that Congress distinguished the registration state from the participating states:

> "The 'registration state' may require applicants to submit evidence that they have been certified by the ICC, that they are properly insured, and that they have a local agent available for service of process .... The registration state also collects and distributes per-vehicle fees for those other states participating in the 'single-state' system through which the carrier seeks to run its vehicles.... Participation is limited under the statute to the 39 states that had earlier elected to join the 'bingo stamp' program.... Each of these states may charge carriers an amount 'equal to the fee, not to exceed $10 per vehicle, that such State collected or charged as of November 15, 1991,' ... and the registration state must 'issue a receipt ... reflecting that the carrier has filed proof of insurance ... and has paid fee amounts in accordance with the fee system established,' ... " (Cites deleted.)

The *Nat'l Ass'n* court scrupulously followed this distinction throughout its opinion. This Court has done the same here.

In particular, the ICC regulation at issue, 49 CFR 1023.33, remained substantially unchanged from 1982 through 1992 when the agency began its rulemaking implementation of the SSRS. Throughout that period it is clear that the regulation and its fee limitation applied only to those states requiring "identification stamps" or an identification number for each vehicle not registered or licensed by such states. It did not apply to the state of registration. The § 2(2) per-vehicle interstate decal fee of the MCA is imposed only where Michigan is the state of registration and licensing. It was therefore not preempted or proscribed by federal law either before or after implementation of the SSRS. In short, Plaintiffs are not due any refund.

Finally, Plaintiffs assert that the Court must grant reconsideration in light of *Yellow Freight, supra*, which they say "is dispositive as to certain critical issues in the instant case." It appears, however, that the only issues presented here that *Yellow Freight* disposed of dealt with remedies, whereas Plaintiffs have no remedy in this matter because they cannot prevail on the merits. *Yellow Freight* held that the state had collected SSRS fees pursuant to § 7(4) of the MCA in excess of the amount allowed by the SSRS and that the excess amount had to be refunded. But none of the Plaintiffs in this action, including those named in the Troy Cab complaint, challenges fee collection under § 7(4) on that specific ground. They allege, rather, that such $10 fee assessed against carriers registered and licensed not by Michigan but by the other participating states is somehow "inconsistent" with the

SSRS requirements – but without spelling out the precise inconsistency implicated in *Yellow Freight.*[7] It follows that *Yellow Freight* does not govern here. Plaintiffs do not challenge § 7(4) based on any inconsistency with the SSRS stemming from the changed method, implemented by the PSC in 1992, for determining reciprocity among the states.

The Court determines that its order of December 30, 1998 was not erroneously entered. The challenged MCA fees are not unlawful taxes and do not violate equal protection guarantees. Plaintiffs therefore have no remedy, either in the form of refunds or as equitable relief pursuant to § 1983, because as previously ruled they

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[7] The inconsistency identified in *Yellow Freight,* p 198, has not been put in contention here:

> "For the 1991 and 1992 registration years, the state collected fees by requiring interstate carriers to buy cab card stamps, also known as 'bingo stamps,' for each of the carrier's vehicles operating within the state. Each stamp cost $10. Pursuant to MCL 478.7(4); MSA 22.565(1) (4), the state had reciprocity agreements with certain other states so that each would waive the fees for vehicles from the other. The dispute arises in part because *the state changed the method it used for determining reciprocity.* For 1991, the state used the 'base-plating system,' which means that reciprocity was determined by the state of the vehicle's registration. In early 1991, the Public Service Commission (PSC) decided that it would quit using the base-plating system. Instead, for the 1992 registration year, fees and reciprocity were determined by the carrier's principal place of business." (Emphasis added.)

As a result of this change of method, the plaintiff paid Michigan about $37,800 more under the new system than it had under the old, a "substantial increase in fees" that clearly violated the SSRS. *Id.* at 198-199.

cannot prevail on the merits. The Plaintiffs' Motion for Reconsideration must therefore be denied.

IT IS FURTHER ORDERED AND ADJUDGED that the Court's written opinion of October 13, 1998, which is incorporated herein by reference, is CONFIRMED. The challenged MCA fees were not preempted by federal legislation and regulations. In particular, the § 2(2) per-vehicle interstate decal fee of $100 was not preempted or prohibited by federal law either before or after implementation of the SSRS where the vehicle's "registration state" is Michigan and where the vehicle is operated entirely in interstate commerce by a Michigan-licensed commercial motor carrier. By the same token, the § 2(1) per-vehicle intrastate decal fee of $100 did not violate the dormant Commerce Clause since it could not impermissibly discriminate against interstate motor carriers where the fee is based purely on Michigan boundaries having no economic relevance for interstate traffic. The challenged fees are constitutional and need not be refunded.

IT IS FURTHER ORDERED AND ADJUDGED that this is the final order of the Court and these consolidated cases are hereby DISMISSED.

IT IS SO ORDERED.

/s/ James R. Giddings
JAMES R. GIDDINGS
Circuit Judge

APPENDIX C

Order **Michigan Supreme Court**
Lansing, Michigan

Entered: December 3, 2003

Maura D. Corrigan,
Chief Justice

123562-5

Michael F. Cavanagh
Elizabeth A. Weaver
Marilyn Kelly
Clifford W. Taylor
Robert P. Young, Jr.
Stephen J. Markman,
Justices

WESTLAKE TRANSPORTATION, INC., VANDERKOOI CARRIERS, INC., EL TORO MOTOR FREIGHT, INC., MYRIAH, INC., PRISM, INC., GERRIGS TRUCKING & LEASING INC., and BEST WAY EXPRESS, INC.,
Plaintiffs-Appellants,

and

SC: 123562-3
COA: 226052, 226122
Court of Claims:
95-015628-CM

AMERICAN TRUCKING ASSOCIATION, INC., and TNT HOLLAND MOTOR EXPRESS, INC.,
Intervening Plaintiffs-Appellees,

v

MICHIGAN PUBLIC SERVICE COMMISSION, DEPARTMENT OF TREASURY, and the STATE OF MICHIGAN,
Defendants-Appellees.

_____/

TROY CAB, INC., DEECO SERVICES, INC., d/b/a DEECO TRANSPORTATION, TIBERIO FRANK, d/b/a FAIRFIELD TOWING, ELEX, INC., d/b/a LAFOND EXPRESS, DALE CONSTINE & SONS, INC., CALCUT SALES & SERVICES, INC., d/b/a CALCUT TRUCKING COMPANY, AMBASSADOR TRANSPORTATION, INC., HAWKINS STEEL CARTAGE, INC., MIDCON FREIGHT SYSTEMS, INC., JLH TRANSFER, INC., H & H ENTERPRISES, d/b/a S & M CARTAGE, INC., CENTRAL TRANSPORT, INC., BANCROFT TRUCKING COMPANY, US TRUCK COMPANY, INC., WEST END CARTAGE, INC., CENTRAL CARTAGE COMPANY, CTX, INC., MOHAWK MOTOR MICHIGAN, INC., ECONOMY TRANSPORT, INC., MCKINLAY TRANSPORT LIMITED, MASON & DIXON LINES, INC., UNIVERSAL AMCAN LIMITED, ROMEO EXPEDITERS, INC., TOM THUMB SERVICES, INC., d/b/a REI, OJ TRANSPORT COMPANY, JLAW ENTERPRISES, INC., and OJ TRANSPORT, INC.,
Plaintiffs-Appellants,

and

AMERICAN TRUCKING ASSOCIATION, INC., and TNT HOLLAND MOTOR EXPRESS, INC.,
Intervening Plaintiffs-Appellees,

SC: 123564-5
COA: 226053, 226137
Court of Claims: 95-015631-CM

v

MICHIGAN PUBLIC SERVICE COMMISSION, DEPARTMENT OF TREASURY, DEPARTMENT OF COMMERCE, and the STATE OF MICHIGAN,
Defendants-Appellees.

_____/

On order of the Court, the application for leave to appeal the March 11, 2003 judgment of the Court of Appeals is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

(LOGO) I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

December 3, 2003 /s/ Corbin R. Davis

49 U.S.C. § 14501. Federal authority over intrastate transportation

* * *

(c) Motor carriers of property. –

(1) General rule. – Except as provided in paragraphs (2) and (3), a State, political subdivision of a State, or political authority of 2 or more States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier (other than a carrier affiliated with a direct air carrier covered by section 41713(b)(4)) or any motor private carrier, broker, or freight forwarder with respect to the transportation of property.

(2) Matters not covered. – Paragraph (1) –

(A) shall not restrict the safety regulatory authority of a State with respect to motor vehicles, the authority of a State to impose highway route controls or limitations based on the size or weight of the motor vehicle or the hazardous nature of the cargo, or the authority of a State to regulate motor carriers with regard to minimum amounts of financial responsibility relating to insurance requirements and self-insurance authorization;

(B) does not apply to the transportation of household goods; and

(C) does not apply to the authority of a State or a political subdivision of a State to enact or enforce a law, regulation, or other provision relating to the price of for-hire motor vehicle transportation by a tow truck, if such transportation is performed without the prior consent or

authorization of the owner or operator of the motor vehicle.

(3) State standard transportation practices. –

(A) Continuation. – Paragraph (1) shall not affect any authority of a State, political subdivision of a State, or political authority of 2 or more States to enact or enforce a law, regulation, or other provision, with respect to the intrastate transportation of property by motor carriers, related to –

(i) uniform cargo liability rules,

(ii) uniform bills of lading or receipts for property being transported,

(iii) uniform cargo credit rules,

(iv) antitrust immunity for joint line rates or routes, classifications, mileage guides, and pooling, or

(v) antitrust immunity for agent-van line operations (as set forth in section 13907),

if such law, regulation, or provision meets the requirements of subparagraph (B).

(B) Requirements. – A law, regulation, or provision of a State, political subdivision, or political authority meets the requirements of this subparagraph if –

(i) the law, regulation, or provision covers the same subject matter as, and compliance with such law, regulation, or provision is no more burdensome than compliance with, a provision of this part or a regulation issued by the Secretary or the Board under this part; and

(ii) the law, regulation, or provision only applies to a carrier upon request of such carrier.

(C) Election. – Notwithstanding any other provision of law, a carrier affiliated with a direct air carrier through common controlling ownership may elect to be subject to a law, regulation, or provision of a State, political subdivision, or political authority under this paragraph.

(4) Nonapplicability to Hawaii. – This subsection shall not apply with respect to the State of Hawaii.

* * *

P.L. 103-305, FEDERAL AVIATION ADMINISTRATION AUTHORIZATION ACT OF 1994

HOUSE CONFERENCE REPORT NO. 103-677

August 5, 1994

[To accompany H.R. 2739]

The committee of conference on the disagreeing votes of the two Houses on the amendment of the Senate to the bill (H.R. 2739) to amend the Airport and Airway Improvement Act of 1982 to authorize appropriations for fiscal years 1994, 1995, and 1996, and for other purposes, having met, after full and free conference, have agreed to recommend and do recommend to their respective Houses as follows:

That the House recede from its disagreement to the amendment of the Senate and agree to the same with an amendment as follows:

In lieu of the matter proposed to be inserted by the Senate amendment, insert the following:

* * *

SECTION 601 – Preemption of Intrastate Transportation of Property

House bill

No provision.

Senate amendment

The Senate provision preempted State and local law regarding trucking rates, routes and services of "intermodal all-cargo air carriers". Intermodal all-cargo air carriers included: air carriers, indirect air cargo air carriers, motor carriers that are affiliated with an air carrier through

common controlling ownership and motor carriers which, as principal or agent, utilize or are affiliated through common controlling ownership with, companies that utilize air carriers at least 15,000 times annually.

Conference substitute

The provisions preempt State regulation of prices, routes and services by air carriers and carriers affiliated with a direct air carrier through common controlling ownership in subsection (b) and all other motor carriers in subsection (c). The purpose of this demarkation is (1) to as completely as possible level the playing field between air carriers on the one hand and motor carriers on the other with respect to intrastate economic trucking regulation, and (2) to recognize that air carrier express package delivery companies may differ in corporate form, but operate in the same manner. Thus, this provision includes carriers affiliated with a direct air carrier through common controlling ownership in a new paragraph added to Section 41713(b) of Title 49, United States, Code, the former section 105 of the Federal Aviation Act. Motor carriers are deregulated with a new subsection (h) added to section 11501 of Title 49 (the Interstate Commerce Act).

Subsection (a) enumerates Congress' findings and purposes in enacting Section 601.

Subsection (b) preempts State regulation of air carriers and carriers affiliated with direct air carriers through common controlling ownership by the addition of a new paragraph (4)(A) to Section 41713(b) of Title 49, United States Code, which is the recodified former Section 105(a)

of the Federal Aviation Act. Paragraph (4)(A) preempts State regulation for this entire class of carriers in an identical manner to the preemption provision passed in 1978 contained in the former Section 105.

The central purpose of this legislation is to extend to all affected carriers, air carriers and carriers affiliated with direct air carriers through common controlling ownership on the one hand and motor carriers on the other, the identical intrastate preemption of prices, routes and services as that originally contained in Section 105(a), 49 U.S.C. App. 1305(a)(1), of the Federal Aviation Act.

However, Congress has recently enacted a recodification of certain subtitles of Title 49. This recodification has changed the language used in the original section 105. For clarity and consistency, we will follow the recodification language in amendments to both the Interstate Commerce Act and Federal Aviation Act. In substituting the word "related" for the prior word "relating" and the word "price" for the word "rates" we are intending no substantive change to the previously enacted preemption provision in Section 105 of the Federal Aviation Act and do not intend to impair the applicability of prior judicial case law interpreting these provisions. In particular, the conferees do not intend to alter the broad preemption interpretation adopted by the United States Supreme Court in Morales v. TransWorld Airlines, Inc. 504 U.S. ___, 199 L.Ed. 157, 112 S.Ct 2031 (1992).

The conferees understand that in recodifying Title 49, Congress made no substantive change to the Statute. Section 1(a) of P.L. 103-272 states "[c]ertain general and permanent laws * * * are revised, recodified and enacted * * * without substantive change * * * " Furthermore, page

5 of the Report accompanying P.L. 103-272 states the following:

"As in other codification bills enacting titles of the United States Code into positive law, this bill makes no substantive change in the law. It is sometimes feared that mere changes in terminology and style will result in changes in substance or impair the precedent value of earlier judicial decisions and other interpretations. This fear might have some weight if this were the usual kind of amendatory legislation when it can be inferred that a change of language is intended to change substance. In a codification law, however, the courts uphold the contrary presumption: the law is intended to remain substantively unchanged." The following authorities affirm this principle: (For a complete list of citations, see Report to Accompany H.R. 1758, P.L. 103-272 [Report number 103-180] at 5.)

Thus, the Conferees have used the term "price, route and service" rather than "rate, route and service" in both the Aviation subtitle and the Motor Carrier subtitle. The intention in using the identical term "price" in both areas is to create uniformity in the preemptive language and to create consistency with the earlier preemption provision. The use of this term is not intended to alter any meaning or affect any judicial interpretation.

To ensure that no meaning is altered or changed by the recodification, the definition of "price" in subtitle VII that was created as part of the recodification of Title 49 has been amended to strike that definition's reference to air transportation. The conferees believe that the recodification's creation of a definition of "price" created a circumstance which would have defined the word in a manner

inconsistent with its intended use and meaning in this section and therefore have made this conforming change. In doing so, the conferees intend no substantive change to existing law, just as the recodification itself is deemed to have made no substantive change in existing law. The substantive meaning and the continuity of case law continue uninterrupted and unaltered from the old section 105 of the Federal Aviation Act, through the recodified version, to the modifications made by this section.

Paragraph (4)(B) emphasizes that State authority to regulate safety, financial responsibility relating to insurance, transportation of household goods, vehicle size and weight and hazardous materials routing of air carriers and carriers affiliated with a direct air carrier through common controlling ownership is unchanged, since State regulation in those areas is not a price, route or service and thus is unaffected. (This provision is identical to the new subsection 11501(h)(2)(A) discussed below.) This list is not intended to be all inclusive, but merely to specify some of the matters which are not "prices, rates or services" and which are therefore not preempted.

The conferees do not intend the regulatory authority which the States may continue to exercise (partially identified in section 41713(b) and under section 11501(h)) to be used as a guise for continued economic regulation as it relates to prices, routes or services. There has been concern raised that States, which by this provision are prohibited from regulating intrastate prices, routes and services, may instead attempt to regulate intrastate trucking markets through its unaffected authority to regulate matters such as safety, vehicle size and weight, insurance and self-insurance requirements, or hazardous materials routing matters. The conferees do not intend for

States to attempt to de facto regulate prices, routes or services of intrastate trucking through the guise of some form of unaffected regulatory authority.

There has been further concern raised that new sections 41713(b)(4)(B) and 11501(h)(2)(A) may be construed as granting States additional authority to regulate in those enumerated areas rather than simply stressing that the preemption provisions do not apply to those areas. The conferees emphasize that nothing in these new subsections contains a new grant of Federal authority to a State to regulate commerce and nothing in these sections amends other Federal statutes that govern the ability of States to impose safety requirements, hazardous materials routing matters, truck size and weight restrictions or financial responsibility requirements relating to insurance or any other unenumerated authority not preempted by these sections.

For example, if a State exercises authority over the routing of hazardous materials shipments by motor carriers, it must exercise that authority consistent with Federal standards issued on routing pursuant to Federal law governing transportation of hazardous materials (49 U.S.C. Sections 5101-5127). The intention of the conferees is solely to identify certain areas that are not preempted by the preemption provision.

New paragraph (4)(C) of Section 41713(b) states that the preemption provision added to Section 41713(b) does not modify any earlier provisions of the current Section 41713(b) or the former Section 105 of the Federal Aviation Act, including that applicable to the State of Alaska.

Subsection (c) of Section 601 preempts State regulation of prices, routes and services of motor carriers by

adding a new subsection (h) to section 11501 of Title 49, United States Code. The preemption provision, new subsection (h)(1), is identical to the preemption provision deregulating air carriers and carriers affiliated with a direct air carrier through common controlling ownership and is intended to function in the exact same manner with respect to its preemptive effects. The intention is to create a completely level playing field between air carriers and carriers affiliated with a direct air carrier through common controlling ownership on the one hand and motor carriers on the other.

New subsection (h)(1) contains a parenthetical limitation which states that this section applies to motor carriers other than those carriers affiliated with a direct air carrier through common controlling ownership. This parenthetical is merely intended to ensure that no carrier affiliated with a direct air carrier through common controlling ownership would be covered by both preemption provisions.

Furthermore, neither preemption provision would preempt the ability of a State to issue a certificate or other documentation (in written or electronic form) demonstrating that the carrier complies with State requirements which are not preempted by these sections and nothing in this amendment is intended to change the application of State tax laws to motor carriers.

The conferees further clarify that the motor carrier preemption provision does not preempt State regulation of garbage and refuse collectors. The managers have been informed by the Department of Transportation that under ICC case law, garbage and refuse are not considered "property". Thus garbage collectors are not considered

"motor carriers of property" and are thus unaffected by this provision.

The term motor carrier as used in new subsection (h) of section 11501 has a broad connotation. The term covers the transportation of property by motor carriers of passengers. Thus, when a motor carrier of passengers is transporting property in intrastate commerce, there is no jurisdiction by the State regulatory body over price, route or service for any of the property being transported. The latter is true even if the property is being transported in the same vehicle that moves passengers.

The term motor carriers covers contract carriers and common carriers of property. Also included in the term is a motor carrier that handles express shipments. The law also applies to private motor carriers, that is, carriers that are pursuing their own business interests or interests of any corporate affiliate.

New subsection (h)(2) emphasizes that State authority to regulate safety, financial fitness and insurance, transportation of household goods, vehicle size and weight and hazardous materials routing of motor carriers is unchanged since State regulation in those areas is not a price, route or service and thus is unaffected. This subsection is identical to section 41713(b)(4)(B), described above.

New subsection (h)(3) permits continued State regulation over four enumerated standard transportation practices in an optional manner. This section does not confer any new authority to a State, but merely confirms that these four areas are not preempted. These four areas are uniform cargo liability rules, uniform bills of lading or receipts, uniform cargo credit rules and antitrust immunity for interlining, classifications and mileage guides.

This permitted State regulatory authority is limited in two respects. First, a State may only regulate in these four areas in a manner that is no more burdensome than a Federal regulation on the same subject matter. Second, none of these regulations shall apply to any carrier that does not wish to be subject to such regulations.

The purpose of new subsection (h)(3) is to permit carriers that want to follow State standard transportation practices to be subject to State-wide regulatory schemes in these four areas only. Any carrier which so chooses does not have to elect to be subject to such regulation.

New subsection (h)(3) also contains a provision that permits carriers affiliated with a direct air carrier through common controlling ownership, which by the explicit terms of new subsection (h)(1) are not subject to the terms of that provision, to elect to be subject to State regulation in any of the four areas enumerated in new subsection (h)(3). This sentence was included to allow a carrier affiliated with a direct air carrier through common controlling ownership to be subject to State regulation in these four areas if it so chose.

Subsection (d) provides that all subsections of Section 601 will take effect on January 1, 1995, except that any regulation of motor carriers operating in the State of Hawaii preempted by subsection (c) of Section 601 shall not be affected for three years from the date of enactment. The conferees directed the difference in the effective date for the State of Hawaii at the request of the State. The State had requested the conferees to totally except Hawaii from the preemption provision based on Hawaii's unique geographic circumstance, as the only State that is non-contiguous to the mainland since the State is totally

surrounded by water. Therefore, all regulation of motor carrier transportation in the State of Hawaii is regulated by the State of Hawaii. Though the conferees were not willing to except Hawaii from the preemption provisions, they were convinced that due to these special circumstances the State should have additional time before preemption goes into effect.

Background and statement of purpose

Currently, 41 jurisdictions regulate, in varying degrees, intrastate prices, routes and services of motor carriers. The jurisdictions which do not regulate are: Alaska, Arizona, Delaware, District of Columbia, Florida, Maine, Maryland, New Jersey, Vermont and Wisconsin.

Typical forms of regulation include entry controls, tariff filing and price regulation, and types of commodities carried. Not all 41 States regulate each of these aspects nor do they all regulate them in the same manner or to the same degree.

Entry controls at the State level vary from liberal to strict. Strict entry controls often serve to protect carriers, while restricting new applicants from directly competing for any given route and type of trucking business. About 26 States strictly regulate trucking prices. Such regulation is usually designed to ensure not that prices are kept low, but that they are kept high enough to cover all costs and are not so low as to be "predatory". Price regulation also involves filing of tariffs and long intervals for approval to change prices. A company which wants to change its prices often must go through a costly and lengthy hearing proceeding in each State in which it operates.

The need for section 601 has arisen from this patchwork of regulation and in a June 25, 1991 9th Circuit Court of Appeals decision (Federal Express Corporation v. California Public Utilities Commission, 936 F.2d 1075 (9th Cir. 1991), cert. denied, 112 S.Ct. 2956 (1992)) in which Federal Express challenged California's authority to regulate the company's motor carrier operations. The court found that intrastate economic regulations for motor carriers did not apply to Federal Express because it was preempted by the Airline Deregulation Act of 1978, by virtue of the fact that it is an air carrier. Although several of its competitors conduct similar operations, they are not organized as air carriers. For example, United Parcel Service remained regulated, because it is organized as a "motor carrier", putting it at a competitive disadvantage in a number of States.

In light of the inequity created by the 9th Circuit Court Decision, California enacted legislation in October of 1993, which extended the exemption enjoyed by Federal Express as a result of its court victory to its competitors that are motor carriers affiliated with direct air carriers. The California legislation denied this exemption, however, to those using a large proportion of owner-operators instead of company employees, thereby denying the exemption to Roadway Package System, even though the Roadway holding company includes an air operation. Likewise, the Texas Attorney General has applied the 9th Circuit decision to Texas and broadened it to include other intermodal air ground carriers with similar operations. The Texas Railroad Commission has accepted the Attorney General decision. However, competitors whose operations are not integrated are still regulated. Likewise, Kentucky enacted legislation in May 1994 exempting from

its regulation the carriage of packages weighing less than 150 pounds, by motor carriers affiliated with either direct or indirect air carriers.

Despite the movement toward deregulation by some individual states, the conferees believe preemption legislation is in the public interest as well as necessary to facilitate interstate commerce. State economic regulation of motor carrier operations causes significant inefficiencies, increased costs, reduction of competition, inhibition of innovation and technology and curtails the expansion of markets. According to Department of Transportation estimates, preemption of State economic regulation could eventually yield $3-8 billion per year in savings. Other estimates put the savings as high as $5-12 billion. The sheer diversity of these regulatory schemes is a huge problem for national and regional carriers attempting to conduct a standard way of doing business. In hearings held on this issue, numerous examples have been cited in which rates for shipments within a state exceed rates for comparable distances across state lines. In the small package express business, companies frequently ship goods across state lines and back into the state of origin to avoid the higher rates for purely intrastate shipments. Lifting of these antiquated controls will permit our transportation companies to freely compete more efficiently and provide quality service to their customers. Service options will be dictated by the marketplace; and not by an artificial regulatory structure.

The provision is supported by the Clinton Administration. Its statement of administration policy during floor consideration of S. 1491 reads: "The Administration particularly supports the Amendment's provision which addresses the problem of inconsistent regulation of

intermodal all-cargo air carriers. Enactment of this provision would be an important step in resolving conflicting laws that interfere with efficient intermodal cargo movements."

After years of official policy against intrastate motor carrier deregulation, the American Trucking Associations issued a position on June 24, 1994 which stated that "ATA will no longer oppose Federal preemption of state regulation of motor carrier rates and entry based on economic factors," with some conditions that would allow regulatory protection to continue for non-economic factors, such as liability rules, antitrust immunity to publish documents, insurance, safety, leasing and cargo credit rules. The conferees have attempted to address these conditions in Section 11501 of title 49 as amended by this provision.

It is important to note that the Senate provision created some ambiguity as to which carriers would be able to avail themselves of the preemption. In the version agreed to by the conferees, it is clear that all air carriers and carriers affiliated with a direct air carrier through common controlling ownership, motor carriers and motor private carriers involved in the transportation of property are covered by the preemption. The conferees believed it was patently unfair to create a level playing field for most of the industry, while leaving an unfortunate few still bound by economic regulatory controls.

The conferees are well aware that in recent years there has been considerable litigation with respect to the status of certain carriers, specifically as to whether they are air carriers or are motor carriers, and whether they are covered by the Railway Labor Act or the National Labor Relations Act. The purpose of this section is to

preempt economic regulation by the States, not to alter, determine or affect in any way whether any carrier is or should be considered either an air carrier or a motor carrier for any purpose there than this section, whether any carrier is or should be covered by one labor statute or another, or the status of any collective bargaining agreement.

During the hearing on preemption of State regulation held by the House Committee on Public Works and Transportation on July 20, 1994, concerns were raised regarding the devaluation of operating rights and its effect on motor carriers, as a result of preemption of State authority to regulate the price, route, or service for intrastate transportation. Some motor carriers have purchased or paid to acquire the authority to operate trucks in many States. These operating rights for many motor carriers, especially small carriers, are an important part of their net business assets. The conferees recognize that this will eliminate the asset value of the operating authority of those affected motor carriers.

From the Committee on Public Works and Transportation, for consideration of titles I and II of the House bill, and the Senate amendment (except secs. 121, 206, 304, 415, 418 and title VI), and the modifications committed to conference:

* * *

THE MOTOR CARRIER ACT
Act 254 of 1933

AN ACT to promote safety upon and conserve the use of public highways of the state; to provide for the supervision, regulation, and control of the use of such highways by all motor vehicles operated by carriers of property for hire upon or over such highways; to preserve, foster, and regulate transportation and permit the coordination of motor vehicle transportation facilities; to provide for the supervision, regulation, and control of the use of such highways by all motor vehicles for hire for such purposes; to classify and regulate carriers of property by motor vehicles for hire upon such public highways for such purposes; to give the Michigan Public Service Commission jurisdiction and authority to prevent evasion of this act through any device or arrangement; to insure adequate transportation service; to give the commission jurisdiction and authority to fix, alter, regulate, and determine rates, fares, charges, classifications, and practices of common motor carriers for such purposes; to require filing with the commission of rates, fares, and charges of contract carriers and to authorize the commission to prescribe minimum rates, fares, and charges, and to require the observance thereof; to prevent unjust discrimination; to prescribe the powers and duties of said commission with reference thereto; to provide for appeals from the orders of such commission; to confer jurisdiction upon the circuit court for the county of Ingham for such appeals; to provide for the levy and collection of certain privilege fees and taxes for such carriers for such purposes and the disposition of such fees and taxes; and to provide for the enforcement of this act; and to prescribe penalties for its violations.

475.2 Legislative purpose and policy.

Sec. 2. It is hereby declared to be the purpose and policy of the legislature in enacting this law to confer upon the commission the power and authority and to make it its duty to supervise and regulate the transportation of property by motor vehicle for hire upon and over the public highways of this state in all matters whether specifically mentioned herein or not, so as to: (a) Relieve all future undue burdens and congestion on the highways arising by reason of the use of the highways by motor vehicles operated by motor carriers; (b) protect and conserve the highways and protect the safety and welfare of the traveling and shipping public in their use of the highways; (c) promote competitive and efficient transportation services; (d) meet the needs of motor carriers, shippers, receivers, and consumers; (e) allow a variety of quality, price, and service options to meet changing market demands and the diverse requirements of the shipping public; (f) allow the most productive use of equipment and energy resources; (g) provide the opportunity for efficient and well-managed motor carriers to earn adequate profits and attract capital; (h) promote intermodal transportation; (i) prevent unjust discrimination; (j) promote greater participation by minorities in the motor carrier system; (k) provide and maintain service to small communities and small shippers; (l) prevent evasion of this act through any device or arrangement; (m) promote entrepreneurship in the motor carrier industry by allowing greater contract carrier economic and entry flexibility; and (n) promote the use of jointly considered and initiated rates, classifications, divisions, allowances, charges, or rules of motor carriers under commission approved agreements.

476.5 Issuance of certificate of authority; findings; protesting application to provide transportation; requirements; petition to intervene; rights of motor carrier filing protest or of intervenor; classes of certificates; burden of proof.

Sec. 5. (1) Except as provided in this section, the commission shall issue a certificate of authority to an applicant authorizing that it provide transportation subject to the jurisdiction of the commission under this article as a motor common carrier of property if the commission finds all of the following:

(a) The character and condition of the vehicles proposed to be operated by the applicant is such that they may be operated safely upon the public highways.

(b) That the applicant is fit, willing, and able to provide the transportation to be authorized by the certificate and to comply with this act and rules and regulations of the commission.

(c) On the basis of evidence presented, that the service proposed will serve a required public purpose, unless the commission finds that the transportation to be authorized by the certificate would create excess service by endangering the ability of the present carriers to provide adequate, economical, safe, and efficient service.

(d) That the service proposed is consistent with the transportation policy set forth in section 2 of article 1.

(2) In making a finding under subsection (1), the commission shall consider and, to the extent applicable, make findings on at least all of the following:

(a) The transportation policy set forth in section 2 of article I.

(b) The existing available and adequate service in relation to the character and volume of available traffic.

(c) Whether the service proposed will create excess service inconsistent with the public interest. The commission shall not find diversion of revenue or traffic from an existing motor carrier to be in and of itself inconsistent with the public interest.

(d) The character of the bond or insurance proposed to be given to insure the protection of the public.

(e) Whether the applicant is fit, willing, and able to provide service commensurate with the extent of the certificate sought.

(3) A motor carrier may not protest an application to provide transportation filed under this section unless all of the following requirements are met:

(a) The protest is filed with the commission not later than 20 days following publication of the notice of the filing of the application in the biweekly bulletin.

(b) The motor carrier possesses a certificate of authority or permit authorizing it to handle, in whole or in part, the traffic for which an application is made.

(c) The motor carrier is willing and able to provide service that meets the reasonable needs of the shippers involved.

(d) The motor carrier has performed service within the scope of the application during the previous 12-month period.

(4) The commission may grant leave to intervene to a person other than a motor carrier or an applicant for a certificate of authority or permit upon a showing of other interests that are consistent with the transportation policy set forth in section 2 of article I. A petition to intervene shall not be granted unless filed with the commission not later than 20 days following publication of the notice of the filing of the application in the biweekly bulletin except for good cause shown.

(5) Any motor carrier having timely filed a protest or any intervenor having timely filed a petition to intervene may participate in person or by counsel, cross-examine witnesses, and offer testimony in support of, or in opposition to, the grant of a certificate of authority.

(6) Certificates of authority issued to motor common carriers of property under this act shall be of 3 classes:

(a) Certificates issued to motor carriers as may be operating over fixed routes or within 1 mile of a fixed route or between fixed termini.

(b) Certificates issued to motor carriers providing a transportation service within an 8-mile radius of a city having a population of 500,000 or more and including each city or village, a part of which is located within the 8-mile radius.

(c) Certificates issued to all other motor common carriers of property.

(7) The burden of proof shall be on the protestant to meet the requirement of subsection (2) (c).

476.6 Schedules of rates, fares, and charges; predatory rate; determination; joint rate; charges, privileges, and rules; printing and filing; public inspection; facilities.

Sec. 6. All motor common carriers of property subject to this act, shall before engaging in business, print and file with the commission and keep open to public inspection in its principal place of business and have available upon request, schedules showing all rates, fares and charges for transportation of property between different points on its route, and also between points on its own route and on the route of any other motor common carrier when a through route and joint rate have been established. When the commission grants a new authority to a motor common carrier, that carrier shall not charge a predatory rate. A predatory rate is a rate found to be below its fully allocated cost by the Michigan public service commission. The commission shall make this determination prior to the issuance of a certificate and commencement of operations. If a joint rate over the through route has not been established the several motor carriers shall file, print, and keep open for public inspection as described in this section, the separately established rates, fares, and charges applied to the through transportation, and shall likewise print, file and keep open to the public inspection all other charges, privileges, or rules which in anywise change, affect or determine any part of the rates, fares, charges, or the value of the service, and other information as required by the commission in its rules. In addition, a motor carrier shall keep the facilities of the motor carrier open to public inspection. A motor common carrier shall not receive or accept any person or property for transportation upon the

highways until in compliance with the requirements of this section.

476.7 Rates, fares, and charges to be just and reasonable; meeting competitive rates; future costs; refunding or remitting portion of required rates, fares, and charges prohibited; carrier as motor common carrier and motor contract carrier.

Sec. 7 (1) All rates, fares, and charges made by any motor common carrier shall be just and reasonable, and shall not be unjustly discriminatory, prejudicial, or preferential. Contract motor carrier rates, fares, and charges made by common motor carriers holding both common carrier and contract carrier authority shall not be considered by the commission to be unjustly discriminatory, prejudicial, or preferential in determining compliance with this section. Existing carriers will be permitted to meet competitive rates without further justification to the commission. The commission shall take into account reasonable estimated or foreseeable future costs in determining whether rates, fares, and charges meet the requirements of this subsection.

(2) A motor common carrier shall not charge, demand, collect, or receive a greater or less or different remuneration for the transportation of property, or for any service in connection therewith, than the rates, fares, and charges which have been legally established and filed with the commission.

(3) A motor common carrier shall not refund or remit in any manner or by any device any portion of the rates,

fares, and charges required to be collected by the tariffs on file with the commission or ordered by the commission.

(4) Nothing in this act shall prohibit a carrier from operating both as a motor common carrier and a motor contract carrier.

477.2 Permit; application; determination; issuance.

Sec. 2. (1) The commission, upon the filing of an application for a permit to operate as a motor contract carrier, shall ascertain and determine, under those reasonable rules as it promulgates, all of the following:

(a) Whether the character of business to be done by the applicant strictly conforms with the definition of a motor contract carrier.

(b) That the character and condition of the vehicles proposed to be operated by the applicant is such that they may be operated safely upon the public highways.

(c) The effect that denying the permit would have on the shippers of the applicant for the permit.

(2) Unless the commission determines that the character of business to be done does not strictly conform with the definition of a motor contract carrier; the transportation to be provided under the permit is or will be inconsistent with the transportation policy set forth in section 2 of article I; that the applicant is unfit; or that the vehicles of the applicant may not be operated safely upon the public highways, the application shall be granted, in whole or in part, and a permit issued upon lawful terms and conditions as the commission imposes, and subject to

the rules promulgated by the commission, for the whole or for only the partial exercise of the privilege sought.

477.6 Duties of commission; rates, practices, and rules; establishment and filing; minimum rate or practice or rule; availability of contract to commission; disclosure; determination of predatory filings; filing statement of charges with commission.

Sec. 6 (1) The commission shall supervise and regulate all motor contract carriers of property, require the filing of annual and other reports and other data by the motor contract carriers; promulgate rules covering the filing with the commission of the changes, and the operations of motor contract carriers in competition with motor common carriers over the highways of this state; and promulgate rules for the purpose of promoting safety upon the highways and the conservation of their use, to the end that the provisions of this act may be fully and completely carried out. The commission, by general order or otherwise, shall promulgate rules in conformity with this act applicable to all motor contract carriers, and to do all things necessary to carry out and enforce the provisions of this act.

(2) Each motor contract carrier, in a form as the commission prescribes and in accordance with the rules as the commission promulgates, shall establish and file with the commission actual rates and practices and rules of the contract carrier related to those rates. A motor contract carrier shall not be required with rate filings to submit evidence of the revenues and expenses to be realized in the performance of its authorized functions. A motor contract

carrier shall make available to the commission its complete contract or contracts, but shall not be required to file such contract or contracts with the commission. A member of the commission, or a clerk, officer, or employee of the state shall not divulge or make known, in any manner whatsoever not provided by this section, to any person the rate filings of a contract carrier, unless a complaint has been brought by order of the commission against a contract carrier alleging that a rate of a contract carrier or practice or rule of the contract carrier related to the rate or value of service under that rate is predatory and in violation of this act. Rate filings of a contract carrier are exempt from disclosure under the freedom of information act, Act No. 442 of the Public Acts of 1976, being sections 15.231 to 15.246 of the Michigan Compiled Laws, unless a complaint has been brought by order of the commission against a contract carrier pursuant to this section. The commission shall review all rate filings to determine that such rate filings are not predatory. When the commission finds that a rate of a contract carrier or practice or rule of the contract carrier related to the rate or the value of service under that rate is predatory and in violation of this act, the commission shall prescribe the minimum rate or practice or rule. In making a predatory rate determination and when prescribing a minimum rate or practice or rule related to a rate for a motor contract carrier, the commission shall consider all of the following:

(a) All revenues and costs associated with 1 specific contract or appendix to that contract.

(b) The effect of a prescribed minimum rate or practice or rule on the movement of traffic by that carrier.

(c) Other matters as the commission considers necessary.

(3) A motor contract carrier shall not receive or accept property for transportation upon the highways until the statement of charges has been filed with the commission.

478.2 Annual fee for administration of act; replacement identification fee; temporary permit; fee; operation of motor vehicle while fees unpaid prohibited; extension prohibited; motor carriers not required to pay fees within certain area; obtaining plates, decals, or tabs at single location.

Sec. 2. (1) In addition to the license fees or taxes otherwise imposed upon motor carriers, there shall be assessed against and collected from each motor carrier for the administration of this act, an annual fee of $100.00 for each self-propelled motor vehicle operated by or on behalf of the motor carrier, except as otherwise provided in this subsection. A motor carrier shall pay a fee of only $50.00 for each self-propelled motor vehicle operated by or on behalf of the motor carrier, if the motor carrier begins operation of the vehicle after June 30 and has not previously paid a fee under this subsection for that vehicle. After payment of the $100.00 annual fee for a motor vehicle, or the $50.00 fee paid for a vehicle operated after June 30, or the $50.00 fee paid for a vehicle used for the transportation of household goods if a motor carrier seeks to begin operating a self-propelled motor vehicle in place of another motor vehicle not leased to the motor carrier by an owner operator for which a fee was paid and surrenders

the identification allocated to the motor vehicle by the commission, accompanied by a fee of $10.00, a replacement identification shall be issued. If the owner operater replaces a vehicle while it is still leased to the same motor carrier to whom it was leased when the identification was issued, the replacement identification fee shall be $10.00. For all other replacement vehicles, the fee shall be $25.00 for each complete or partial calendar year quarter remaining in the year as of the date the replacement vehicle is to begin operating upon surrender of the identification allocated to the motor carrier by the commission. For each truck or tractor used exclusively for the transportation of household goods as defined by the commission, the annual fee shall be $50.00

INTRASTATE LICENSING ACTIVITIES BY STATE

A Supplement to the October 4, 1995, Issue of the *Truckload Carrier Report*. Information provided by Jim Balfkin, ATA Assistant Director of the State Laws Dept.

State	Agency	App. Fee	Per-Vehicle Fee
Alabama	Public Service Commission 334-242-5200	$100	none
Alaska	none	none	none
Arizona	none	none	none
Arkansas	State Highway and Transportation Department 501-569-2355	$25	$5 SSRS receipt in lieu
California	Public Utilities Commission 415-703-2063 *Regulatory gross receipts fee due	$1000	none
Colorado	Public Utilities Commission 303-894-2000 x451	$50	$5 SSRS receipt in lieu
Connecticut	none	none	none
Delaware	none	none	none
District of Columbia	none	none	none

Florida	none	none	none
Georgia	Public Service Commission 404-559-6609	$50	$5 SSRS receipt in lieu
Hawaii	Public Utilities Commission 808-586-2020 *no new licenses being granted		
Idaho	Public Utilities Commission 208-334-0329	none	$21 (can be mileage-prorated)
Illinois	Commerce Commission 217-782-4654	$300 (also $25 insurance filing)	$6 SSRS receipt in lieu
Indiana	Department of Revenue 317-232-2720	none	$10 SSRS receipt in lieu
Iowa	Department of Transportation 505-237-3364	none	$10/tractor $5/truck
Kansas	Corporation Commission 913-271-3146	$25	$10 SSRS receipt in lieu
Kentucky	Transportation Cabinet 502-564-2548	$25	none
Louisiana	none *regulatory gross receipts fee due	none	none

Maine	none (no application required but IRP/SSRS must show ME) *wholly intrastate only need license, $25 app fee, $8 per-vehicle fee	none	none
Maryland	none *flammables license through PSC	none	none
Massachusetts	none	none	none
Michigan	Department of Commerce 517-334-6366	$100	$100
Minnesota	Department of Transportation 612-296-7109	$150	none
Mississippi	Public Service Commission 601-961-5449	$50	$10 SSRS receipt in lieu
Missouri	Division of Transportation 314-751-3658	none	$10 SSRS receipt in lieu unless SSRS fees waived by reciprocity
Montana	none	none	none
Nebraska	none	none	none
Nevada	none *wholly intrastate only need license	none	none

New Hampshire	none	none	none
New Jersey	none (NJ plate required)	none	none
New Mexico	State Corporation Commission 505-827-4078	none	none
New York	Department of Transportation 518-457-6503	$50	none
North Carolina	none (no application required but IRP/SSRS must show NC)	none	none
North Dakota	none	none	none
Ohio	Public Utilities Commission 614-466-7259	none	$30/tractor $20/truck
Oklahoma	Corporation Commission 405-521-2251	$100	$7 SSRS receipt in lieu
Oregon	Public Utility Commission 503-378-6699	$300	none
Pennsylvania	Public Utility Commission 717-787-3834 *regulatory gross receipts fee due	$100	none

Rhode Island	Public Utilities Commission 401-277-3500 x 159	$100	none
South Carolina	Public Service Commission 803-737-5198	$25	none
South Dakota	none	none	none
Tennessee	Public Service Commission 615-741-2974	$50	$8 SSRS receipt in lieu
Texas	Department of Transportation 512-465-3500	$100 (also $100 insurance filing)	$10 SSRS receipt in lieu unless SSRS fees waived/ reduced by reciprocity
Utah	Public Service commission 801-530-6952 *regulatory gross receipts fee due	$100	none
Vermont	none	none	none
Virginia	State Corporation Commission 804-367-0270	$50	$10 SSRS receipt in lieu
Washington	Utilities & Transportation Commission 360-753-3111 *regulatory gross receipts fee due	$400	none

West Virginia	Public Service Commission 304-340-0427	$100	varies by weight (max. $126/tractor $84/trailer)
Wisconsin	Department of Transportation 608-266-1356	$500	none
Wyoming	Department of Transportation 307-777-4850	$40 $15/ private	none

(2)

Supreme Court, U.S.
FILED
MAY 3 - 2004
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No. 03-1250

In the Supreme Court of the United States

TROY CAB, INC, ET AL

Petitioners,

v.

MICHIGAN PUBLIC SERVICE COMMISSION, ET AL

Respondents.

On Petition For Writ of Certiorari To The Michigan Court of Appeals

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Under MCL 478.1 and MCL 478.2(1), motor carrier vehicles that engage in intrastate commerce pay an annual fee of $100 for the administration of the Michigan Motor Carrier Act and other Acts related to the safety of Michigan's highways. Petitioners assert that the $100 fee is preempted by the Federal Aviation Administration Authorization Act of 1994. The Michigan Court of Appeals neither addressed nor considered this claim since the Petitioners did not contest the trial court's ruling that federal law did not preempt the challenged fees. The Michigan Court of Appeals, however, did address Petitioners' claim that they were not permitted to discovery facts related to their preemption claim. The Michigan Court of Appeals found the Petitioners never sought evidence relating to the preemption issue despite an ample opportunity to do so.

The questions presented are:

Even if the fact that Petitioners submitted no evidence is ignored and even if their claim of preemption is properly preserved, have Petitioners established that the challenged Motor Carrier Act's fee provisions are preempted by federal law?

Whether this Court should review an issue that was not considered by the appellate court below?

Where the Petitioners failed to present evidence to support their claims, did the Michigan Courts properly grant summary disposition against them?

PARTIES TO THE PROCEEDING

The parties to the proceeding in the Michigan Court of Appeals were Westlake Transportation, Inc., Vanderkooi Carriers, Inc., El Toro Motor Freight, Inc., Myriah, Inc., Prism, Inc., Gerrigs Trucking & Leasing, Inc., Best Way Express, Inc., Troy Cab, Inc., Deeco Services, Inc., d/b/a Deeco Transportation, Tiberio Frank, d/b/a Fairfield Towing, Elex, Inc., d/b/a Lafond Express, Dale Constine & Sons, Inc., Calcut Sales & Services, Inc., d/b/a Calcut Trucking Company, Ambassador Transportation, Inc., Hawkins Steel Cartage, Inc., Midcon Freight Systems, Inc., JLH Transfer, Inc., H & H Enterprises, Inc., d/b/a S & M Cartage, Inc., Central Transport, Inc., Bancroft Trucking Company, US Truck Company, Inc., West End Cartage, Inc., Central Cartage Company, CTX, Inc., Mohawk Motor Michigan, Inc., Economy Transport, Inc., McKinlay Transport Limited, Mason & Dixon Lines, Inc., Universal Amcan Limited, Romeo Expediters, Inc., Tom Thumb Services, Inc., d/b/a REI, OJ Transport Company, JLAW Enterprises, Inc., OJ Transport, Inc., Michigan Public Service Commission, Michigan Department of Treasury, Michigan Department of Commerce, the State of Michigan, American Trucking Associations, Inc., and TNT Holland Motor Express, Inc. Petitioner TNT Holland Motor Express, Inc. has since become USF Holland, Inc.

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JURISDICTION

The Michigan Court of Appeals decision was entered on March 11, 2003. The judgment of the Michigan Supreme Court denying Petitioners' Application for Leave to Appeal was entered December 3, 2003. The jurisdiction of this Court is invoked under 28 USC 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Supremacy Clause of the United States Constitution, art VI, cl 2, provides in relevant part:

> This Constitution, and the Laws of the United States which shall be made in pursuance thereof. . . shall be the supreme Law of the Land. . . and the judges in every State shall be bound thereby, anything in the Constitution or the Law of any State to the Contrary notwithstanding.

Michigan Compiled Laws (MCL) 478.1 provides:

> Each application filed with the commission for a certificate of authority or for a permit, as required by this act, shall be accompanied by a fee of $100.00. Each application filed with the commission for the renewal of a certificate or permit shall be accompanied by a fee of $50.00 for the administration of this act, which fee shall be in addition to all other fees, and shall be retained by the commission and deposited with the state treasurer, whether or not the certificate or permit or the renewal of the certificate or permit is granted.

MCL 478.2(2) provides:

> (2) A motor carrier licensed in this state shall pay an annual fee of $100.00 for each vehicle operated by the motor carrier which is registered in this state and operating entirely in interstate commerce. A motor carrier shall pay a fee of only $50.00 for each self-propelled motor vehicle operated by or on behalf of the motor carrier if the motor carrier begins operation of the vehicle after June 30 and has not previously paid a fee under this subsection for that vehicle.

49 USC 14501. Federal authority over intrastate transportation.

* * *

(c) Motor carriers of property. –

(1) General rule. – Except as provided in paragraphs (2) and (3), a State, political subdivision of a State, or political authority of 2 or more States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier (other than a carrier affiliated with a direct air carrier covered by section 41713(b)(4)) or any motor private carrier, broker, or freight forwarder with respect to the transportation of property.

(2) Matters not covered. – Paragraph (1) –

(A) shall not restrict the safety regulatory authority of a State with respect to motor vehicles, the authority of a State to impose highway route controls or limitations based on the size or weight of the motor vehicle or the hazardous nature of the cargo, or the authority of a State to regulate motor carriers with regard to minimum amounts of financial responsibility relating to insurance requirements and self-insurance authorization;

* * *

STATEMENT

1. Prior Proceedings

On August 23, 1994, the Federal Aviation Administration Authorization Act of 1994 (FAAAA) was signed into law. Section 601 of the FAAAA preempted state economic regulation of motor carriers related to price, route or services. Section 601 effected a partial preemption of state law, which is evidenced by Section 601's (49 USC 14501(c)(2)) description of matters not covered, wherein Congress stated that the preemption:

> (A) shall not restrict the safety regulatory authority of a State with respect to motor vehicles, the authority of a State to impose highway route controls or limitations based on the size or weight of the motor vehicle or the hazardous nature of the cargo, or the authority of a State to regulate motor carriers with regard to minimum amounts of financial responsibility relating to insurance requirements and self-insurance authorization; and

On September 8, 1994, the Michigan Public Service Commission (MPSC) issued an order, with notice to all interested parties including Petitioners, initiating a contested case proceeding (MPSC Case No. T-1273) to examine the effect of Section 601 of the FAAAA on the Michigan Motor Carrier Act (MCA), MCL 475. 1 *et seq*, and associated rules. In that September 8, 1998 order, the MPSC indicated that following the submission of evidence and testimony, it would issue a decision determining which sections of the MCA and its rules had been preempted and which had not.

On January 11, 1995, following contested case hearings and the submission of briefs by interested parties, the MPSC issued its opinion and order in MPSC Case No. T-1273, identifying those provisions of the MCA and rules promulgated thereunder, that were preempted by Section 601 of the FAAAA as well as those

sections that were not preempted by Section 601 and which remained binding on motor carriers.

With regards to the assessment of annual registration fees, the MPSC found in its January 11, 1995 Opinion and Order that they were not preempted by Section 601 of the FAAAA, stating:

> [T]]he preemptive effect of Section 601 extends only to issues of price, route, and service. Neither the language of Section 601 nor the Conference Report imply that fees imposed by a state's existing regulatory structure might fall within that relatively narrow range of issues. Thus, application of the annual registration fee required by MCL 478.2 is not preempted.

Importantly, the MPSC's opinion also notes that the MCA does not require that revenue received (i.e. from fees) under that law be used exclusively for economic reason. *Id.* Thus, the fees received can be used only to fund non-preempted motor carrier regulatory activities performed by the MPSC.

On appeal, the Michigan Court of Appeals in *In Re Federal Preemption of Provisions of the Motor Carrier Act,* 223 Mich App 288; 566 NW2d 299 (1997), upheld the MPSC's opinion and order with respect to fees, finding that it was not only in keeping with Section 601's partial preemption but also supported by the record, as follows:

> The PSC still has significant regulatory obligations. For example, the PSC must supervise and regulate the safety of motor carrier operations. MCL 479.41; MSA 22.587(1). There is still a certification process. It follows that the fees for obtaining a certificate of authority, MCL 478.1; MSA 22.560, for protesting an application for a certificate, MCL 478.1a; MSA 22.560(1), and for administering the act, MCL 478.2(1); MSA 22.561(1), are unaffected by the preemptive effect of § 601. In fact,

> because the PSC is not using its resources to enforce preempted portions of the Motor Carrier Act, the fees collected by the PSC are not related to the preempted provisions and rules. Indeed, appellants Central Transport and Universal Am-Can have not shown that the cost of the PSC's operations has ever been totally funded by the fees it collects, and they have not provided any reason to believe that the fees collected were or can be used only for what is now preempted economic regulation.

The Michigan Supreme Court unanimously denied the application for leave to appeal. 458 Mich 852. One of the parties, Central Transport, Inc., then filed a Petition for Writ of Certiorari. The question presented in the Petition was:

> Whether Section 601 of the Federal Aviation Administration Authorization Act of 1994 ("Section 601"), which prohibits virtually all state regulation of intrastate motor carriers, except for certain specified safety powers, preempts the annual per-vehicle fee provision for intrastate motor carriers contained in the State of Michigan's former economic regulatory statute?

This Court denied the Petition. *Central Transport, Inc v Michigan Public Service Comm*, 525 US 1018 (1998).

2. Proceedings in the instant case

a. Michigan Court of Claims

In *Westlake, et al*, Docket No. 95-15628-CM and *Troy Cab, et al*, Docket No. 95-15631-CM, Westlake and Troy Cab both challenged the lawfulness of the collection of fees pursuant to the MCA. These cases were certified as a class action on June 9, 1995.

Petitioners filed a motion for partial summary disposition asserting that the fee provisions of the MCA were preempted by § 601 of the FAAA On October 13, 1998, the Court of Claims issued its Opinion, finding that Petitioners' motion was without merit and denied the motion (Pet. App. 36-50). On December 30, 1998, the Court granted the State Defendants' Motion for Summary Disposition (Pet. App. 54-56). On March 7, 2000 the Court denied Plaintiffs' Motion for Reconsideration (Pet. App. 57-72). Petitioners filed a claim of appeal with the Michigan Court of Appeals on March 24, 2000.

b. Michigan Court of Appeals.

On March 11, 2003, the Court of Appeals, issued its opinion in the consolidated appeals and affirmed the Court of Claims summary disposition ruling in favor of the State Defendants. The court stated:

> In their complaints, plaintiffs and intervening plaintiffs allege that the intrastate fees in MCL 478.1 and MCL 478.2(1) were preempted by § 601 of the FAAAA. Subsection 601(h), which became effective on January 1, 1995, prohibited state regulation of prices, routes, or services of motor carriers, save for a few delineated exceptions. (Currently codified as 49 USC § 14501[c].)
>
> Plaintiffs argue that the court erred in granting defendants summary disposition on this issue before discovery was complete.[9] Plaintiffs assert that they should have been allowed an opportunity to conduct additional discovery in order to show that, as utilized, the intrastate fees are prohibited by federal law.
>
> *In re Fed Preemption of Provisions of the Motor Carrier Act*, 223 Mich. App. 288, 302; 566 N.W.2d 299 (1997), held that § 601 did not preempt the entire MCA and did not indicate an intent to preempt fee provisions such as MCL 478.1 and MCL 478.2. The Court noted that in response to the enactment of the FAAAA, the PSC "issued considered decisions that indicated how its

regulation of the trucking industry in Michigan was affected by federal legislation preempting at least some aspects of state regulation." *In re Motor Carrier Act, supra* at 300. In regard to the fee provisions at issue, the Court stated:

> The PSC still has significant regulatory obligations. For example, the PSC must supervise and regulate the safety of motor carrier operations. MCL § 479.41; MSA 22.587(1). There is still a certification process. It follows that the fees for obtaining a certificate of authority, MCL § 478.1; MSA 22.560, for protesting an application for a certificate, MCL § 478.1a; MSA 22.560(1), and for administering the act, MCL § 478.2(1); MSA 22.561(1), are unaffected by the preemptive effect of § 601. In fact, *because the* PSC is not using its resources to enforce preempted portions of the Motor Carrier Act, the fees collected by the PSC are not related to the preempted provisions and rules. Indeed, appellants Central Transport and Universal Am-Can have not shown that the cost of the PSC's operations has ever been totally funded by the fees it collects, and they have not provided any reason to believe that the fees collected were or can be used only for what is now preempted economic regulation. [*Id.* at 302-303; emphasis added.]

Plaintiffs contend that the PSC intrastate fees were being used to fund preempted portions of the MCA, and, thus, the fees were related to a preempted provision. Therefore, the fees were also preempted. Plaintiffs did not submit any documentary evidence below in support of this contention. Plaintiffs argue that they had intended to do so, but their opportunity was foreclosed when the court denied their motion for partial stay and bifurcation of issues. Plaintiffs requested a 90- to 120-day stay in the proceedings to conduct discovery in order to present a factual record to the court in a supplemental brief in

response to the decision in *In re Motor Carrier Act, supra*; however, the court denied the motion without prejudice because it believed its summary-disposition ruling would cover the issue.

A court's decision regarding matters of discovery is reviewed on appeal for an abuse of discretion. *In re Pott*, 234 Mich. App. 369, 373; 593 N.W.2d 685 (1999). Plaintiffs could not address this Court's decision in *In re Motor Carrier Act, supra*, in their original motions for partial summary disposition because they were filed and argued in 1995, and the case was not decided until April 25, 1997. However, plaintiffs did not file their motion for partial stay and bifurcation of issues until March 1998, nearly one year later. The record indicates that plaintiffs were conducting discovery during this entire time, yet never sought evidence relating to this issue.

We find that plaintiffs had ample opportunity to conduct discovery following the decision in *In re Motor Carrier Act, supra*, and file a supplemental brief containing their findings. Given that one year had passed, we also find that there is no reason to believe that had plaintiffs been given another three or four months in which to conduct discovery, plaintiffs would have uncovered a factual basis for their claim. Furthermore, we note that by stipulation, discovery was to be completed 180 days after the court issued its ruling on the parties' motions for summary disposition.

Plaintiffs assert in their reply brief that they are not arguing that they were prevented from conducting discovery, but that they were denied an opportunity to supplement their motion papers. However, the court did not foreclose plaintiffs' opportunity to present their argument. They could have filed additional briefs at any time before the court issued its ruling. In fact, on January 28, 1998, plaintiffs filed a supplemental brief in support of their motions for summary disposition and in opposition to defendants' motion, in which they

specifically mentioned *In re Motor Carrier Act, supra*. This indicates plaintiffs were well aware of the import of the case, and could have conducted discovery and presented their argument accordingly. Plaintiffs mention that defendants did not submit the opinion as authority until January 1998. However, *In re Motor Carrier Act* was decided in April 1997, and nothing prevented plaintiffs from proactively distinguishing their case from it.

Moreover, the court specifically invited plaintiffs to present their argument again if they thought its ruling did not adequately cover the issue. Plaintiffs did file a motion for reconsideration after the court issued its orders on the parties' motions for summary disposition, yet did not reraise this issue. We recognize that plaintiffs renewed their motion to stay on October 8, 1998; however, this was before the court issued its ruling. Because the court had not yet issued its ruling, plaintiffs could have attempted to conduct discovery after its first motion was denied.

Therefore, we conclude that the court did not abuse its discretion in denying plaintiffs' request to stay the proceedings in order to conduct additional discovery. A decision of a court that obtained the correct result, albeit for a different reason, will be affirmed on appeal. *Lavey v Mills*, 248 Mich. App. 244, 250; 639 N.W.2d 261 (2001).

---

[9] We note that plaintiffs do not contest the court's summary-disposition ruling, that § 601 did not preempt the intrastate fees.

Petitioners filed an Application for Leave to Appeal with the Michigan Supreme Court on April 1, 2003.

c. Michigan Supreme Court

On December 3, 2003, the Michigan Supreme Court denied the application for leave (Pet. App. 73-75).

REASONS FOR DENYING THE PETITION

A. Under Michigan Court Rule (MCR) 2.116(c)(10), summary disposition is properly granted where a party opposing such a motion failed to present evidence to support its claim.

In presenting its case at the state level, the Petitioners failed to present evidence in support of its claim that the intrastate fees in MCL 478.2 and MCL 478.2(1) were preempted by § 601 of the FAAAA. On January 3, 1995, Petitioners filed a class action in the Michigan Court of Claims challenging the $100 fee imposed by MCL 478.1 and MCL 478.2(1). They filed and argued a motion for summary disposition in 1995. The Michigan Court of Appeals issued its decision in *In Re Fed Preemption, supra*, on April 25, 1997. The Court of Claims issued its written opinion denying Petitioners' motion on October 13, 1998 (Pet. App. 36-50) and entered its order denying the motion on November 12, 1998 (Pet. App. 51-53). The Court of Claims specifically invited Petitioners to present their argument again if they thought the Court's ruling did not cover the issue. Pet. App. 23. The Petitioners filed a motion for reconsideration and the Court denied the motion on March 7, 2000 (Pet. App. 57-72). While Petitioners were conducting discovery during this entire time, they never sought discovery relating to the issue in this case. As a result the trial court properly granted summary disposition to the Respondents pursuant to Michigan Court Rule (MCR) 2.116(C)(10).[1]

In the Michigan trial courts, a motion for summary disposition under MCR 2.116(C)(10) tests whether there is factual support for a claim and is reviewed de novo by Michigan

---

[1] MCR 2.116(C)(10) provides:

> Except as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law.

courts on appeal. *Spiek v Dept of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). In *Maiden v Rozwood*, 461 Mich 109, 120-121; 597 NW2d 817 (1999), the Michigan Supreme Court addressed the legal standard under which motions brought pursuant to MCR 2.116(C)(10) are to be decided:

> A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. In evaluating a motion for summary disposition brought under this subsection, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. MCR 2.116(C)(10), (G)(4). . . .
>
> * * *
>
> A litigant's mere pledge to establish an issue of fact at trial cannot survive summary disposition under MCR 2.116(C)(10). The court rule plainly requires the adverse party to set forth specific facts at the time of the motion showing a genuine issue for trial.
>
> Today we clarify the correct legal standard under MCR 2.116(C)(10) because our Court has inconsistently applied the standard since the 1985 amendment of the court rule. . . . The reviewing court should evaluate a motion for summary disposition under MCR 2.116(C)(10) by considering the substantively admissible evidence actually proffered in opposition to the motion. A reviewing court may not employ a standard citing the mere possibility that the claim might be supported by evidence produced at trial. A mere promise is insufficient under our court rules. [Citations omitted.]

Thus even if the Petitioners had stated a *prima facie* case when before the trial court it was also required to show there is a

genuine issue of material fact, that is based on something more than mere conjecture. This the Petitioners failed to do. *Durant v Stahlin*, 375 Mich 628, 638; 135 NW2d 392 (1965); *Anderson v Kemper Insurance Co.*, 128 Mich App 249, 252-253; 340 NW2d 87 (1983). Therefore, under the Michigan Court Rules, a party, when challenged, must show that it has a case on the law *and* that there is some evidentiary proof of specific facts to support its allegations. *Durant* at 638; *Remes v Dobys*, 87 Mich App 534, 537-538; 274 NW2d 64 (1978). If a party opposing a MCR 2.116(C)(10) motion fails to present such evidentiary proofs, summary disposition is properly granted. *Smith v Globe Life Ins Co.*, 460 Mich 446, 455-456 n2; 597 NW2d 28 (1999). Having waived the opportunity to present evidence to support its claim, Petitioners should neither be allowed to avoid MCR 2.116(C)(10) nor be heard to complain.

After the Petitioners failed to present any evidence in support of its claims, the Michigan Court of Appeals correctly affirmed the Michigan Court of Claims.

B. Because the Michigan Court of Appeals did not review Petitioners' preemption issue, this Court should deny review of that issue.

In discussing the Petitioners' preemption claims that the fees in MCL 478.1 and 478.2(1) are preempted, the Michigan Court of Appeals noted at footnote 9 (Pet. App. 20) of its Opinion:

> We note that plaintiffs do not contest the court's summary disposition ruling, that § 601 did not preempt the intrastate fees.

The Michigan Court of Appeals then addressed the Petitioners' other claim regarding the challenged fee sections, i.e. – whether the Petitioners were wrongly denied discovery or the opportunity to present supplemental pleadings. The Michigan Court of Appeals examined those contentions and found that they lacked merit. (Pet. App. 22-23). The Michigan Court of Appeals,

however, did not address the Petitioners' claim that MCL 478.1 and 478.2(1) were preempted. While the Petitioners' brief (Res. App. 8b-12b) to the Michigan Court of Appeals did contain argument regarding § 601, it is nonetheless clear that the Court of Appeals did not believe the Petitioners had properly contested the trial court's ruling that § 601 did not preempt the intrastate fees. Because the Michigan Court of Appeals held that the issue had not been presented, it did not consider the issue. In the past, this Court has generally declined invitations to review issues not addressed by the appellate courts below. *Zobrest v Catalina Foothills School Dist*, 509 US 1, 8 (1993) (where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them.") The Petitioners have failed to present any compelling reasons why this Court should depart from that practice.

C. Even if the fact that Petitioners submitted no evidence is ignored, and even if their claim of preemption is properly preserved, they still have not established that the Michigan Motor Carrier Act's fee provisions are preempted by federal law.

1. Introduction.

Basically, Petitioners contend that the Michigan Court of Appeals erred when it did not rule contrary to *In Re Federal Preemption, supra*,[2] even though they acknowledge they submitted no evidence to support their claim and did not prove their case (Res. App. 7b, 13b-14b). Further, their strictly legal argument that Section 601 of the FAAAA results in the preemption of virtually all state motor carrier laws is without merit. The FAAAA, by its own terms, does not support the broad sweep of federal motor carrier preemption, urged by the Petitioners. Section 601 expressly excepts from its preemptive

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[2] As previously noted herein, the Michigan Court of Appeals decision in *In Re Federal Preemption, supra*, was ultimately appealed to this Court, which denied certiorari in *Central Transport, Inc, supra*, to an issue very similar to the one Petitioners present here.

effect significant aspects of regulation, including safety regulation, regulation of size and weight of vehicles, regulation of insurance requirements, and regulation of the transportation of household goods.

The Petitioners erroneously contend that the sole focus of the MCA is the economic regulation of competition. This is not true since the MCA, from its very inception, has had as a dual purpose to "protect and conserve the highways and protect the safety and welfare of the traveling and shipping public in their use of the highways." MCL 475.2.

2. Federal Preemption Is Determined By Congressional Intent, And Is Limited And Strictly Construed With Respect To Statutes Enacted Under The State's Police Powers.

Congressional intent determines whether federal law preempts state law. "[T]he critical question in any preemption analysis is always whether Congress intended that federal regulation supersede state law." *Louisiana Public Service Comm v Federal Communications Comm*, 476 US 355, 369 (1986) ("*Louisiana PSC*"). This Court in *Louisiana PSC* identified when Congress can be understood to have preempted state law:

> Pre-emption occurs when Congress, in enacting a federal statute, expresses a clear intent to pre-empt state law..., when there is outright or actual conflict between federal and state law..., where compliance with both federal and state is in effect physically impossible..., where there is implicit in federal law a barrier to state regulation..., where Congress has legislated comprehensively, thus occupying an entire field of regulation and leaving no room for the States to supplement federal law..., or where the state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress. . . . (Citations omitted). 476 US at 368-369.

Petitioners erroneously argue that Congress has occupied virtually the entire field of regulation. However, federal occupation of a field will not be lightly inferred:

> The principle to be derived from [Supreme Court] decisions is that federal regulation of a field of commerce should not be deemed preemptive of state regulatory power in the absence of persuasive reasons - either that the nature of the regulated subject matter permits no other conclusion or that the Congress has unmistakably so ordained. *Florida Lime & Avocado Growers v Paul*, 373 US 132, 147 (1963).

Moreover, preemption of matters "within the traditional police power of the State should not be lightly inferred." *Fort Halifax Packing Co v Coyne*, 482 US 1, 21 (1987). A federal statute will be read to supersede a State's historic powers only if this is "the clear and manifest purpose of Congress." *Hillsborough County v Automated Medical Laboratories, Inc*, 471 US 707, 715 (1985).

This Court has also recognized that, in exercising its power under the Commerce Clause, "Congress may weigh relative needs and restrict the application of a legislative policy to less than the entire field." *Mabee v White Plains Publishing Co*, 327 US 178, 184 (1946). In *Cloverleaf Butter Co v Patterson*, 315 US 148, 155 (1942), this Court added that, where there has only been a partial exercise of the federal government's power over interstate commerce, "the state may legislate freely upon those phases of the commerce which are left unregulated by the nation."

As is evident from its plain language, Congress in Section 601 effected only a *partial* preemption, while expressly *preserving* other state regulation (safety, fitness, etc), which necessarily includes the attendant fees used for such continued regulation. Congress neither sought nor intended to occupy virtually all motor carrier regulation (or to bar continued state regulation in

the areas not preempted). Section 601 did not preempt areas relating to safety, fitness, certificates, fees, among others.

3. The Express Language Of FAAAA Section 601 And Its Legislative History Establish That Congress Did Not Intend To Preempt Non-Economic State Regulation Of Intrastate Transportation Of Property By Motor Carriers, Including Safety and Fitness Regulation, And The Issuance Of Certificates And Collection Of Fees Related Exclusively To Such Non-Preempted Regulation.

Section 601 provides for only partial preemption of traditional state authority to regulate intrastate motor carrier matters, and did not preempt all state regulation of for-hire carriers as Petitioners' claim. By its own terms, Section 601 provides for only partial preemption of state regulation, namely, economic regulation "related to a price, route, or service of any motor carrier". Section 601(h) [49 USC 14501(c)], in pertinent part, states:

> (1) GENERAL RULE. -- Except as provided in paragraphs (2) and (3), a State, political subdivision of a State, or political authority of 2 or more States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier (other than a carrier affiliated with a direct air carrier covered by section 41713(b)(4) of this title) or any motor private carrier with respect to the transportation of property.
>
> (2) MATTERS NOT COVERED. -- Paragraph (1) --
>
> (A) *shall not restrict the safety regulatory authority of a State with respect to motor vehicles, the authority of a State to impose highway route controls or limitations based on the size or weight of the motor vehicle or the hazardous nature of the cargo, or the authority of a State to regulate motor carriers with regard to minimum amounts of financial*

> *responsibility relating to insurance requirements and self-insurance authorization; and*
>
> (B) *does not apply to the transportation of households goods.* (Emphasis added).

Besides the plain language of Section 601's statutory provisions, the legislative history also establishes that only a *partial* preemption was intended by Congress, and not the sweeping preemption that Petitioners suggest. The preemption as stated pertains only to that which is "related to a price route, or service of any motor carrier." The legislative history further indicates that the specific exemptions from preemption listed in Section 601(h)(2)(A) (e.g., safety, financial fitness, fees, size, weight, etc.) were *not* intended as a specific or exhaustive list, but were meant as examples of the kind of state regulation that remains. In other words, Congress preempted only those matters which are expressly preempted in the FAAAA, and nothing else. In this regard, the House Conference Report No. 103-677, p. 84, reprinted in 1994 U.S.C.C.A.N. 1756 states:

> Paragraph (4)(B) emphasizes that State authority to regulate safety, financial responsibility relating to insurance, transportation of household goods, vehicle size and weight and hazardous materials routing of air carriers and carriers affiliated with a direct air carrier through common controlling ownership is unchanged, since State regulation in those areas is not a price, route or service and thus is unaffected. (This provision is identical to the new subsection 11501(h)(2)(A) discussed below.) *This list is not intended to be all inclusive, but merely to specify some of the matters which are not "prices, rate or services" and which are therefore not preempted.* (Emphasis added).

The House Conference Report No. 103-677, reprinted in 1994 U.S.C.C.A.N. 1757 further indicates that those matters which are not a price, rate or service are not preempted, stating as follows:

> New subsection (h)(2) emphasizes that State authority to regulate safety, financial fitness and insurance, transportation of household goods, vehicle size and weight and hazardous materials routing of motor carriers is unchanged since State regulation in those areas is not a price, route or service and thus is unaffected. This subsection is identical to section 41713(b)(4)(B), described above.

The same House Conference Report also provides compelling evidence that congressional intent is not to preempt the ability of the states to issue statewide certificates of authority applicable to motor carriers to demonstrate their compliance with state and federal laws, or to interfere with tax (or fee) laws, as follows:

> Furthermore, neither preemption provision would preempt the ability of a State to issue a certificate or other documentation (in written or electronic form) demonstrating that the carrier complies with State requirements which are not preempted by these sections and nothing in this amendment is intended to change the application of State tax laws to motor carriers. [House Conference Report, 103-677, p. 85, reprinted in 1994 U.S.C.C.A.N. 1757.]

Petitioners, however, claim that a broad preemptive purpose can be ascertained by looking at the language Congress has used to deregulate the airline industry (citing Airline Deregulation Act of 1978 (ADA), 49 USC 41713). Petitioners indicate that the ADA prohibited the states from enacting or enforcing Laws "relating to rates, routes, or services." Citing the House Conference Report on Section 601, Petitioners claim that this Court's decision in *Morales v TransWorld Airlines*, 504 US 374 (1992) should be the starting point for any determination of the preemptive effect of the FAAAA.

The *Morales* case, however, involved a different issue, under a different Act, relating to solely to airlines. Furthermore, the FAAAA, adopted in August 1994, and effective January 1, 1995, was simply not before this Court in *Morales* in 1992. As with any other statutory construction issue, any analysis of Section 601 of the FAAAA should start with the plain language of the FAAAA itself.

It should also be noted that Section 601 was expressly given prospective, not retroactive, effect. By its terms, Section 601 is effective January 1, 1995. The FAAAA did not transform this Court's ruling in *Morales*, applicable to an airline, as a retroactive preemption of state law relative to motor carrier regulation. Moreover, the MPSC prior to the adoption of Section 601 had already ruled that economic regulations related to rates, routes, or services do not apply to air carriers, or to motor carrier operations integrated with air carriers, but would apply only to ground-only motor carrier functions, not having a connection with air carriers.[3] Thus, the MPSC has always regulated in a manner consistent with the 1992 *Morales* decision.

Also, in *Morales*, the airlines sued to enjoin various State attorneys general from enforcing state guidelines requiring that airline advertisements contain certain disclosures as to fare terms, restrictions and availability. The Court concluded that the airlines' advertisements "relat[ed] to rates" and were therefore preempted by the ADA. This Court, however, in *Morales* emphasized the limited reach of its holding:

> Nor need we address whether state regulation of the non-price aspects of fare advertising (for example, state laws preventing obscene depictions) would similarly 'relat[e]

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[3] The MPSC in its August 25, 1992 Order in *In Re Federal Armored*, MPSC File No. 23409, Case No. 5, determined that the economic regulation of motor carrier air-ground services were subject to preemption under Section 1305 of the Airline Deregulation Act, but the carrier's strictly ground-based services were not preempted.

> to' rates; the connection would obviously be far more tenuous. . . . *'[s]ome [S]tate actions may affect [airline fares] in too tenuous, remote, or peripheral a manner' to have pre-emptive effect.* (Emphasis added). 504 US at 390.

Both Section 601 itself and House Conference Report 103-677 thus indicate that with the preemption of state regulation "related to a price, route, or service of a motor carrier" that Congress listed, by example and not specific list, several major areas of state regulation which were *not* preempted. Such examples included, *inter alia*, the major area of safety related regulation and the ability of states to review and issue (or deny) statewide certificates of authority to ensure compliance with state and federal law. Similarly, Section 601 contains no language suggesting that the collection of fees is in any way altered. In fact, the presumption is that the fee collection power was continued in order to provide revenues to ensure proper safety related regulation, and to ensure that the motor carrier industry pays its fair share of services rendered by the states, which benefit motor carriers.

The legislative history indicates that a primary intent behind Section 601's preemption was to provide a level playing field relative to economic regulation of motor carriers and air carriers, and *not* to impact safety or other non-economic motor carrier regulation. House Conference Report, 103-677, pp. 85-87, reprinted in 1994 U.S.C.C.A.N. 1757-1759. Thus, the overriding goal of Section 601 was to put all motor carriers on an equal competitive footing regardless of whether their services did or did not include an air carrier component. Therefore it may be seen that the FAAAA's preemption relates to the economic regulation relating to a "price, route, or service" and not to other regulatory areas, and not to areas of state regulation that Section 601 expressly exempted from preemption (safety, fitness, etc).

4. The Michigan Court of Appeals correctly held in *In Re Federal Preemption, supra*, that FAAAA Section 601 does not preempt the MCA fee provisions.

The Michigan Court of Appeals in *In Re Federal Preemption,* 223 Mich App at 301, correctly found that the clear and unambiguous language of Section 601 expressed Congressional intent not to preempt all state regulation of the trucking industry. The Court of Appeals characterized Section 601's preemptive effect as follows:

> Congressional intent is the cornerstone of preemption analysis. *Ryan v Brunswick Corp*, 454 Mich 20, 27; 557 NW2d 541 (1997). Regardless of the similarities between the Airline Deregulation Act of 1978 and § 601 of the FAAAA, it is clear and unambiguous from the language of § 601 that the congressional intent was not to preempt all state regulation of the trucking industry. Section 601 expressly excepts from its preemptive effect significant aspects of regulation, including safety regulation, regulation of size and weight of vehicles, regulation of insurance requirements, and regulation of the transportation of household goods. If the language of a statute is clear and unambiguous, the plain meaning of the statute reflects the legislative intent. . . . [T]he House Conference Report indicates that "economic regulation" is intended to be preempted and that states retain their authority to regulate various aspects of the transportation industry. See H R Conf Rep No 677, 103rd Cong, 2nd Sess, pp 84-85. The title given to § 601(h) is "Preemption of State Economic Regulation of Motor Carriers." (Emphasis added.) The argument that Congress intended to preempt the entire field of regulation of motor carriers fails in the face of the language of the legislation and its history. The PSC's determination that § 601 was intended to preempt only economic regulation is consistent with the language and history of the legislation.

The Court of Appeals then concluded, 223 Mich App at 302-303:

> The PSC still has significant regulatory obligations. For example, the PSC must supervise and regulate the safety of motor carrier operations. MCL 479.41; MSA 22.587(1). There is still a certification process. It follows that the fees for obtaining a certificate of authority, MCL 478.1; MSA 22.560, for protesting an application for a certificate, MCL 478.1a; MSA 22.560(1), and for administering the act, MCL 478.2(1); MSA 22.561(1), are unaffected by the preemptive effect of § 601. In fact, because the PSC is not using its resources to enforce preempted portions of the Motor Carrier Act, the fees collected by the PSC are not related to the preempted provisions and rules. Indeed, appellants Central Transport and Universal Am-Can have not shown that the cost of the PSC's operations has ever been totally funded by the fees it collects, and they have not provided any reason to believe that the fees collected wee or can be used only for what is now preempted economic regulation.

Despite having submitted no additional evidence in the instant case, Petitioners continue to argue that MCL 478.1 and MCL 478.2 which provide for the collection of fees, were preempted by Section 601. The Petitioners' entire theory, however, is based upon the erroneous premise that the fees are to be impliedly swept into preemption as relating to "a price, route, or service of any motor carrier." As noted, however, neither the issuance and renewal of statewide certificate authority, nor the state fees at issue, were intended to be preempted by Congress, as they are not related to "a price, route, or service" of a motor carrier.

The Petitioners fail to acknowledge that Congress, by expressly preserving significant aspects of state motor carrier regulation such as safety, fitness, etc., adopted only a partial preemption of state law. Moreover, the part of regulation

preempted by Section 601 does not affect the regulatory fees in this case as the MPSC has not engaged in any economic or other regulation preempted by Section 601. Since January 1, 1995, the MPSC has only engaged in regulatory activity, such as safety, which is expressly not preempted by Section 601, and has used all collected regulatory fees only for said activity or to reimburse the state for motor carrier related costs.

Although the Petitioners' claim that preemptive effect of the FAAAA was more extensive than what the Michigan Court of Appeals found, they have failed to address or rebut major underpinnings of the Michigan Court of Appeals' decision. For example, the Court of Appeals found that the FAAAA, by its own terms, does not support the "broad sweep of the federal motor carrier preemption", urged by the Petitioners.

The Petitioners fail to come to grips with the fact that the Michigan Court of Appeals finding with respect to the extent of the FAAAA's preemption comes from a plain reading of that Act. In essence, what the Michigan Court of Appeals found is that because the statute is clear and unambiguous, no statutory interpretation is necessary. Thus, the language of the statute controls.

In summary, Section 601 contains no language that preempts the continued authority of the states to grant statewide certificates to ensure continued compliance with state and federal laws applicable to motor carriers, and to collect applicable fees to fund non-preempted regulation such as safety and fitness. Moreover, Congressional intent, discussed *infra*, indicates that no preemption of statewide certificates or fees was intended.

5. A Major Purpose Of The MCA Extends To Safety Regulation, Which Has Been Preserved By FAAAA Section 601.

Petitioners erroneously contend that the sole focus of the MCA is state economic regulation of motor carriers. Petitioners are incorrect because the MCA, since its enactment in 1933, has

had the dual purpose of not only economic regulation, but also, importantly, safety regulation.

The very first titled purpose of the Motor Carrier Act is "to promote safety upon and conserve the use of public highways of the state..." This is restated in the purpose and policy section of the Act, MCL 475.2, which states in part as follows:

> It is hereby declared to be the purpose and policy of the Legislature in enacting this law to confer upon the Commission the power and the authority and to make it its duty to supervise and regulate the transportation of property by motor vehicle for hire upon and over the public highways of this state in all matters whether specifically mentioned herein or not, so as to:... (b) *protect and conserve the highways and protect the safety and welfare of the traveling and shipping public in their use of the highways*;... (emphasis added).

The current title to the MCA also provides for the collection of fees and taxes from motor carriers to promote highway safety and conservation as follows:

> [T]o provide for the levy and collection of certain privilege fees and taxes for such carriers *for such purposes* and the disposition of such fees and taxes; ... (emphasis added).

The MCA extensively addresses safety, fitness, and insurance issues. MCL 475.5 tailors the duration of evidentiary proceedings to accommodate fitness issues, and MCL 476.3 requires MPSC review of applications for certificates of authority to verify the physical condition of the equipment and property of the applicant as well as to ascertain that the vehicles of the applicant have passed an inspection within the proceeding 12 months pursuant to the requirements of the Motor Carrier Safety Act, 1963 PA 181, MCL 480.11, *et seq*.

Sections 476.5, 476.10, 478.7, 479.9, 479.10, 479.11, 479.12 and 479.13 all underscore and amplify the Commission's regulatory duties relating to public safety as they apply to motor carriers. These sections spell out the Commission's responsibilities ranging from insurance monitoring and other record checking to leasing, contested case evidentiary presentations, rulemaking responsibilities, and collection of assessments. The MPSC is also granted "authority to prevent evasion of this act through any device or arrangement" [Title and MCL 475.2(l)] and to do "all things necessary to carry out and enforce this act." (MCL 476.10).

Both the MPSC and the State Police also act in concert, in many instances, to enforce both the MCA and the Michigan Motor Carrier Safety Act, 1963 PA 181, MCL 480.11, *et seq*. In addition, 1993 PA 352, effective January 13, 1994, now Article VI of the MCA, MCL 479.41 ("Art VI"), which expands the MPSC jurisdiction and authority relative to motor carrier safety, in conjunction with the State Police, states:

> Sec. 1. The commission shall supervise and regulate the safety of operations of each motor carrier. The commission may promulgate rules for the purpose of promoting safety upon the highways and the conservation of their use. [MCL 479.41].
>
> * * *
>
> Sec. 2. Upon request of the commission, the department of state police shall review the operation of an intrastate motor carrier to determine whether the carrier is in compliance with applicable safety related laws and rules and issue a report within 60 days after completion of its review to the commission. [MCL 479.42].
>
> * * *
>
> Sec. 3. The public service commission, in cooperation with the department of state police, will develop and

> implement by rule or order a motor carrier safety rating system within 12 months after the effective date of this article. In the rating system, an unsatisfactory rating shall not be imposed without an on-site safety review being conducted by the department of state police. [MCL 479.43].

MCA Art VI thus explicitly authorizes cooperative functions between the MPSC and State Police in furthering motor carrier related public safety. Pursuant to Art. VI, the MPSC may request State Police review of the operations of particular motor carriers for compliance with safety related laws and rules. Moreover, the two agencies are directed to cooperate in developing a motor carrier safety rating system which is now in place and is being administered by the MPSC.

In light of the foregoing, the Petitioners contention that the MCA's sole focus was the economic regulation of motor carriers lacks merit. Instead, the MCA contains numerous provisions related to safety and other matters not preempted by Section 601 of the FAAAA. The MPSC has made a good faith effort to comply with federal law and has done so by identifying those provisions of the MCA that were preempted by the FAAAA and which would no longer be enforced by the MPSC pending anticipated action by the Michigan Legislature to conform the MCA with the FAAAA. The determinations made by the MPSC are consistent not only with the plain language of Section 601 of the FAAAA but also with the legislative history underlying that enactment.

6. Petitioners' arguments concerning the distinction between "motor vehicle" and "motor carriers" is without merit.

Petitioners have misconstrued the interchangeability of the word motor vehicles and motor carrier as being an exclusion of a motor carrier of property from the state regulatory authority.

Their premise is based upon 49 USC 14501(c)(2)(A), which provides:

> Matters not covered. Paragraph (1) -- shall not restrict the safety regulatory authority of a State with respect to motor vehicles, the authority of a State to impose highway route controls or limitations based on the size or weight of the motor vehicle or the hazardous nature of the cargo, or the authority of a State to regulate motor carriers with regard to minimum amounts of financial responsibility relating to insurance requirements and self-insurance authorization.

Petitioners' construction of the statutory term is too narrow and no evidence on record supports this assertion. To be a motor carrier one must have the direction and control of a motor vehicle, which does the carrying for him. *Moore v United States*, 41 F Supp 786, 792 (DC Minn 1941), *aff'd* 316 US 642 (1942). See also *Loving v United States*, 32 F Supp 464 (1940) using the word a common carrier by motor vehicle.

In addition, pursuant to 49 USC 13102(12): "The term 'motor carrier' means a person providing motor vehicle transportation for compensation."

Further, Petitioners' additional assertion is that the only regulatory authority conferred by Congress on the state is with respect to motor vehicles is contradictory to a reasonable interpretation of § 14501(c)(2)(A). When considering preemption, the Court starts with the assumption that the historic police powers of the States re not to be superseded by the Federal Act unless there is a clear and manifest purpose of Congress to do so. *City of Columbus v Ours Garage and Wrecker Serv*, 536 US 424, 432-433 (2002) (quoting *Rice v Santa Fe Elevator Corp*, 331 US 218, 230(1947)). Also, "Federal preemption prescriptions *relating to motor carriers*, contained in 49 USC 14501(c), specifically save to States "safety regulatory authority. . . with respect to *motor vehicles*. § 14501(c)(2)(A). *Id.* at 427-428. The

Court referred to federal preemption relating to motor carriers and not motor vehicles.

This Court and Congress interchangeably used the phrase motor carriers and motor vehicles. Furthermore, the definition under 49 USC 13102, which defines a motor carrier as a provider of a motor vehicle for compensation confirms Petitioners' misconception. Neither the statute nor case law supports Petitioners' distinction between motor carriers and motor vehicles.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted

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Dated: May, 2004

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STATE OF MICHIGAN
COURT OF APPEALS

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Plaintiffs/Appellants,

and

COA 226052
COA 226122

AMERICAN TRUCKING ASSOCIATIONS, INC., and TNT HOLLAND MOTOR EXPRESS, INC.,

Court of Claims
No. 95-15628 CM

Intervening Plaintiffs/Appellants,

PLAINTIFFS-APPELLANTS' BRIEF ON APPEAL

ORAL ARGUMENT REQUESTED

MICHIGAN PUBLIC SERVICE COMMISSION, its COMMISSIONERS, JOHN G. STRAND, RONALD E. RUSSELL, and JOHN L. O'DONNELL, MICHIGAN DEPARTMENT OF TREASURY and its STATE TREASURER and the STATE OF MICHIGAN,

Defendants/Appellees,

Consolidated With,

TROY CAB, INC., DEECO SERVICES, INC., d/b/a DEECO TRANSPORTATION, FRANK TIBERIO, d/b/a FAIRFIELD TOWING, ELEX, INC., d/b/a LAFOND EXPRESS, DALE CONSTINE & SONS, INC., CALCUT SALES & SERVICES, INC.,

d/b/a CALCUT TRUCKING COMPANY, AMBASSADOR TRANSPORTATION, INC., HAWKINS STEEL CARTAGE, INC., MID-CON FREIGHT SYSTEMS, INC., JLH TRANSFER, INC., H&H ENTERPRISES, INC., D/B/A S&M CARTAGE, INC., CENTRAL TRANSPORT, INC., BANCROFT TRUCKING CO., U.S. TRUCK CO., INC., WEST END CARTAGE, INC., CENTRAL CARTAGE CO., CTX, INC., MOHAWK MOTOR OF MICHIGAN, INC., ECONOMY TRANS-PORT, L.T.D., MASON & DIXON LINES, INC., UNIVERSAL AM-CAN, L.T.D., ROMEO EXPEDITERS, INC., TOM THUMB SERVICES, INC., d/b/a REI, O-J TRANSPORT COMPANY, J-LAW ENTERPRISES, INC., ALLIANCE OF O-J TRANSPORT, INC., Individually on behalf of all others similarly situated,

Plaintiffs/Appellants,

v

STATE OF MICHIGAN, MICHIGAN DEPARTMENT OF TREASURY, TREASURER OF THE STATE OF MICHIGAN, MICHIGAN DEPARTMENT OF COMMERCE, DIRECTOR OF THE MICHIGAN DEPARTMENT OF COMMERCE, MICHIGAN PUBLIC SERVICE COMMISSION, CHAIRMAN OF THE MICHIGAN PUBLIC SERVICE COMMISSION, JOHN G. STRAND, COMMISSIONER OF THE MICHIGAN PUBLIC SERVICE COMMISSION, RONALD E. RUSSELL, and COMMISSIONER OF THE MICHIGAN PUBLIC SERVICE COMMISSION, JOHN L. O'DONNELL,

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PLAINTIFFS-APPELLANTS' BRIEF ON APPEAL

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Separate from their challenge to the Interstate Decal Fee imposed upon interstate motor carriers, Appellants also sought to demonstrate to the Court of Claims that the $100 Intrastate Decal Fee assessed against intrastate carriers under MCL § 478.2(1); MSA 22.561(1) is preempted effective January 1, 1995 pursuant to Section 601 of the FAAAA. As shown below, the broad preemptive scope of Section 601, when read in light of In re Federal Preemption, supra, compels reversal and remand to the Court of Claims for further fact-finding relevant to Appellants' claim. Appellants remain convinced that, had they not been denied a full and fair opportunity to prove their case, judgment in their favor on their Section 601 claims would have been ordained.[18]

[18] By its terms, Section 601 does not apply to state laws or regulations relating to the price, route, or service of a motor vehicle engaged in the transportation of household goods. 49 USCA § 14501(c)(2)(B). Thus, insofar as MCL § 478.2(1); MSA 22.561(1) imposes a $50 decal fee on vehicles used exclusively for the intrastate transportation of household goods, it is not the subject of either the Westlake Complaint or the Troy Cab Complaint and should not be the subject of any court order in this case.

1.
Section 601 Broadly Preempts All Laws Related To Motor Carrier Prices, Routes, And Services

Section 601, entitled Preemption of Intrastate Transportation of Property, was enacted by the 103rd Congress, signed into law by President Clinton on August 23, 1994, and upheld as a valid exercise of preemptive powers in Kelley v. U.S., 69 F.3d 1503 (10th Cir. 1995), cert. denied, 517 U.S. 1166, 116 S.Ct. 1566, 134 L.Ed.2d 665 (1996). In enacting Section 601, Congress expressly found that state regulation of intrastate transportation has unreasonably burdened interstate commerce, impeded the free flow of trade, and proved unreasonably costly. Section 601(a)(1), 108 Stat. 1605, 1605.[19] Thus, effective January 1, 1995, Section 601(c) broadly preempted the MPSC's economic regulation of intrastate motor carrier operations by directing that no state or political subdivision may

> enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier. . . .

49 USCA § 14501(c)(1) (emphasis supplied).

The limited exceptions to Section 601, none of which apply in this case, are extremely narrow. Specifically, states may still regulate activity related to cargo liability, bills of lading, cargo credit rules, or antitrust immunity, but only if a motor carrier voluntarily subjects itself to such state regulation. 49 USCA § 14501(c)(3). In addition, the states are still afforded authority in three other safety-related arenas:

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[19] A complete copy of Section 601 is reproduced in the Appendix at 17. As applied to motor carriers, Section 601 was originally codified at 49 USCA § 11501 (1994 Supp.) (superseded) but later recodified in substantially-similar form at 49 USCA § 14501 (1997).

(1) Motor vehicle safety;

(2) Highway routing or limitations based upon the size or weight of the motor vehicle or the hazardous nature of the cargo; and

(3) Minimum amounts of financial responsibility relating to insurance requirements and self-insurance authorization.

49 USCA § 14501(c)(2)(A). Notably, these three non-preempted areas embrace common "police powers" that are in virtually all circumstances reserved to and exercised by state authorities over every kind of motor vehicle, not just motor vehicles operated by for-hire motor carriers.

That Section 601 is intended to have broad preemptive effect is shown by legislative history evidencing Congress's intent to deregulate the motor carrier industry in the same broad way it previously deregulated the airline industry. As that legislative history shows, the House conferees expressly adopted "the broad preemptive interpretation" set forth in Morales v. Trans World Airlines, Inc., 504 U.S. 374, 112 S.Ct. 2031, 119 L.Ed.2d 157 (1992), a decision that interpreted the preemptive language of the Airline Deregulation Act ("ADA"). House Conf. Rep. No. 103-677, 103rd Cong., 2d Sess. (1994), reprinted in 1994 U.S. Code Cong. & Ad. News 1715, 1755 (hereinafter cited as "Report"). In Morales, the U.S. Supreme Court held that airline advertising was related to rates, routes, or services and thus state law could in no way regulate such advertising. The Court then went on to hold that any state law or regulation having any "connection with, or reference to," a rate, route, or service of airline transportation was preempted. 504 US at 384; 112 SCt at 2037; 119 L Ed2d at ___.

The U.S. Supreme Court's words illustrate that, in making express reference to Morales, the House conferees sought to remove all doubt as to whether Congress intended sweeping

preemptive changes to motor carrier regulation when it enacted Section 601. Using the plain-spoken phrasing of Morales, preemption of laws "related to a price, route, or service of any motor carrier" means expansive and conspicuous preemption of all laws "having a connection with or reference to" a price, route, or service of any motor carrier.[20] Also relevant is the U. S. Supreme Court's more recent interpretation of the ADA in American Airlines v Wolens, 513 US 219, 115 SCt 817, 130 L Ed 2d 715 (1995), in which the Court found that a claim based on state-imposed obligations – which the MSPAC's claim to the Intrastate Decal Fee clearly is – is a preempted activity.[21]

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[20]As indicated in the Report, the wording interpreted in Morales, supra, is slightly different from that employed in Section 601. Under the original airline deregulation statute, the words employed were "relating to rates, routes, or services," while under the recodified version of that statute and under Section 601, the words employed are "related to a price, route, or service." However, the conferees stated that they did not intend to "alter the broad preemption interpretation" of Morales by "substituting the word 'related' for the prior word 'relating' and the word 'price' for the word 'rates'... ." Report, reprinted in 1994 U.S. Code Cong. & Ad. News 1715, 1755.

[21]More recently, this Court has itself had occasion to address the preemptive scope of both the ADA and Section 601 in cases that are not analogous to this case. Compare Thomas v. United Parcel Service, 241 Mich. App. 171, 614 N.W.2d 707 (2000) (race and gender discrimination claim not preempted) with Gilman v. Northwest Airlines, Inc., 230 Mich. App. 293, 583 N.W.2d 536 (1998) (age and sex discrimination claim not preempted) and Fitzpatrick v. Simmons Airlines, Inc., 218 Mich. App. 689, 555 N.W.2d 479 (1996), lv den, 456 Mich. 891, 570 N.W.2d 785 (1997) (airline height and weight standards preempted). More relevant decisions by this Court in In Re Federal Preemption, supra, and Michigan Trucking Ass'n v. Michigan Public Service Commission, 225 Mich. App. 424,

571 N.W.2d 734 (1997), lv den, 459 Mich. 859, 583 N.W.2d 900 (1998) are discussed above.

Significantly, the federal preemption brought about by the ADA was so broad that it also had an effect on motor carriers. Therefore, in Federal Express Corp v California Public Utilities Commission, 936 F2d 1075 (9th Cir 1991), cert den, 504 US 979, 112 S Ct 2956, 119 L Ed 2d 578 (1992), on remand, 1993 WL 399380 (ND Cal 1993) (unpublished),[22] the appellate court ruled that the ADA preempted state regulatory control over motor vehicle operations that were an integral part of an air carrier's integrated business. Among the regulatory provisions nullified by the court was a quarterly fee assessed by the state public utilities commission that, like the Intrastate Decal Fee, was primarily used to defray the cost of economic regulation. See 1993 W.L. 399380 at *6 (citing Cal Pub Util Code §§ 5003.1). In the Court's view, "[t]he PUC's... imposition of fees enter[ed] the zone that Congress has forbidden the states to enter," and, as a result, the California regulatory fee was preempted. 936 F 2d at 1078.

Further, on remand in Federal Express, the district court reviewed the ADA's impact on a regulatory fee imposed upon so-called exempt carriers, those whose rates were not regulated. The court held that the exempt carrier fee was preempted, rejecting the California commission's argument that the fee revenue was necessary for non-economic (non-preempted) regulation. Because the fee revenue was "applied indiscriminately to the full range of CPUC regulatory activity," 1993 WL 399380 at *7, the court persuasively held that the fee could not be harmonized with the ADA as supporting only an isolated class of acceptable regulation.

Like the California fee provisions, the Intrastate Decal fee has been used to support and provide for the economic regulation of motor carrier rates, routes, and services as dictated by the language in the MMCA, and, as will be

[22]The unpublished decision on remand is reproduced in the Appendix at 18.

discussed further below, there was no evidence presented to the Court of Claims that the fee is now used exclusively for non-preempted activities related only to Appellants' operations. Further, a $100 fee imposed annually on each vehicle used by a motor carrier engaged in the intrastate transportation of property cannot help but be "related to a price, route, or service" of the motor carrier. As such , the Intrastate Decal Fee should have been captured by the preemptive net of Section 601. As shown below, however, the Court of Claims placed undue reliance on In Re Federal Preemption, supra, and erroneously ruled to the contrary.

2.

Under In Re Federal Preemption, Appellants Should Have Been Afforded The Opportunity To Prove Their Case

On April 25, 1997, after the parties' cross-motions for disposition had been fully briefed and argued, this Court handed down its opinion in In Re Federal Preemption, supra. The case arose from administrative proceedings in which the MPSC determined for itself which provisions of the MMCA it deemed preempted by Section 601. On appeal, this Court ruled – based upon the limited record before it – that all fees imposed by the MMCA survived preemption because the MPSC "still has significant regulatory obligations" after enactment of Section 601. 223 Mich. App. at 302, 566 N.W.2d at 305. As a result, the Court of Claims decided that In re Federal Preemption was outcome-determinative of Appellants' claim and entered summary disposition in favor of Appellees. The Court of Claims erred, however, because its undue reliance upon In re Federal Preemption was misplaced.

In In re Federal Preemption, this Court simply accepted the MPSC's representation, without benefit of any factual record, that it would not use the Intrastate Decal Fee to support preempted portions of the MMCA. Further, the Court noted that the parties opposing the MPSC's action had not proven

anything to the contrary. Specifically, the Court observed as follows:

> The PSC still has significant regulatory obligations. For example, the PSC must supervise and regulate the safety of motor carrier operations. There is still a certification process. It follows that the fees ... for administering the act ... are unaffected by the preemptive effect of § 601. In fact, because the PSC is not using its resources to enforce preempted portions of the Motor Carrier Act, the fees collected by the PSC are not related to the preempted provisions and rules. Indeed, appellants ... have not shown that the cost of the PSC's operations [has] ever been totally funded by the fees it collects, and they have not provided any reason to believe that the fees collected were or can be used only for what is now preempted economic regulation.

Id. at 302-03, 566 NW2d at 305 (citations omitted; emphasis supplied). Importantly, Appellants sought to submit the proof lacking in In Re Federal Preemption, but they were denied that opportunity by the Court of Claims.

On March 23, 1998, Appellants filed with the Court of Claims a Motion for Partial Stay and Bifurcation of Issues in response to the In Re Federal Preemption decision. Appellants asked the court to bifurcate their Section 601 claim from the pending cross-motions for summary disposition and to stay its hand for a period of 90 to 120 days while Appellants conducted discovery and made a factual record for the court. It was Appellants' express intent to directly address In re Federal Preemption by supplementing their motion for summary disposition with evidence demonstrating the MPSC's continued use of the Intrastate Decal Fee for economic regulatory purposes contrary to the terms and intent of Section 601 and

further showing why the MPSC's continued collection of the same fees for substantially-reduced regulatory activity should be deemed preempted. See Plaintiffs' Motion for Partial Stay and Bifurcation of Issues. The Court of Claims, however, denied Appellants' motion and then ruled against Appellants on their Section 601 claim almost six months later.

In Re Federal Preemption is not dispositive of Appellants' challenge to the Intrastate Decal Fee. Rather, what was dispositive of Appellants' claim was the Court of Claims' erroneous ruling denying Appellants the opportunity to present the type of factual record that this Court did not have when it issued the In Re Federal Preemption decision. Notably, Appellants requested, at most, four months to make their record, which, given the Court of Claims' six-month delay in ruling following its denial of Appellants' motion, would have been more than sufficient time to make a difference in the outcome of this case. The Court of Claims ruling must be reversed, and this case should be remanded for further discovery and the submission of proof necessary to rebut the MPSC's unsubstantiated contention that it uses the Intrastate Decal Fee for only non-preempted purposes. There are at least four reasons why such a result is warranted.

First, as noted above, a $100 per-vehicle fee cannot help but affect the rates, routes, and service of a motor carrier. Indeed, the Intrastate Decal Fee stands as a direct roadblock to a motor carrier's very livelihood – the operation of its vehicles upon the highways of the state – and its continued assessment thus prompts the following question: If Congress intended to make entry into intrastate transportation markets easier by enacting Section 601, how can it be said that such a goal has been accomplished if motor carriers must still pay the exact same per-vehicle fee they paid before Section 601 went into effect? The answer to that question is apparent: It cannot be said that Congress's intent has been carried out because the MPSC has not dismantled the onerous financial barricade erected long before enactment of Section 601, and thus the

exact same roadblock "having a connection with or reference to" motor carrier prices, routes, and services continues to block Appellants' movement in the intrastate transportation market. The Intrastate Decal Fee, therefore, should not be permitted to stand untested as to its use and purpose.

Second, justification of the Intrastate Decal Fee based upon the unsubstantiated claim that it is used only for non-preempted purposes runs afoul of Congressional intent. Lest there be any question in this regard, the House Conference Report contemplated the exact type of argument advanced by the MPSC in this case with the following pointed comment:

> The conferees do not intend the regulatory authority which the States may continue to exercise ... to be used as a guise for continued economic regulation as it relates to prices, routes or services. There has been concern raised that States, which by this provision are prohibited from regulating intrastate prices, routes and services, may instead attempt to regulate intrastate trucking markets through its unaffected authority to regulate matters such as safety, vehicle size and weight, insurance and self-insurance requirements, or hazardous materials routing matters. The conferees do not intend for States to attempt to de facto regulate prices, routes or services of intrastate trucking through the guise of some form of unaffected regulatory authority.

Report, reprinted in 1994 U.S. Code Cong. & Ad. News 1715, 1756 (emphasis supplied). In light of such express congressional intent, Appellants should be afforded the right to show that the Intrastate Decal Fee is a de facto regulation of their rates, routes, and services that cannot now be justified by the non-preempted powers the MPSC still retains.

Third, the broad claim of "safety" cannot in and of itself shield the Intrastate Decal Fee from Congressional attack under Section 601. As the district court explained in Federal Express, "[t]he field of safety, while susceptible to regulation, is not talismanic." 1993 WL 399380 at *4. Therefore, state safety regulation after federal preemption of economic entry and rate regulation may not be accomplished

> by means of blunt regulations which ... transgress into federally protected territory. The [state's] role in the protection of safety – however indispensable – must be fulfilled by well-tailored rules that do not relate to [a carrier's] rates, routes or services.

Id. at *6. Using the Federal Express court's words, the Intrastate Decal Fee is unlawfully "blunt," and it is certainly not "well-tailored." By law, it is expressly "assessed against and collected from each motor carrier for the administration of [the MMCA]" – the compilation of Michigan statutes that authorizes economic regulation of motor carrier prices, routes, and services. See MCL § 478.2(1); MSA 22.561(1) (emphasis supplied). At the same time, however, administration of Michigan's Motor Carrier Safety Act, MCL §§ 480.11, et seq; MSA 9.1666(1), et seq, is the job of the Department of State Police, not the MPSC, and Appellants are therefore rightly skeptical of the MPSC's sweeping proclamation that the Intrastate Decal Fee must be saved in the name of "safety."[23]

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[23]This is not to say that Michigan Trucking Ass'n, supra, was wrong in its conclusion that Section 601 did not preempt the MPSC's statutory authority to work with the Department of State Police in adopting a motor carrier safety rating system. 225 Mich App at 429, 571 NW2d at 736-37. However, nothing in that case supports the proposition that the same $100 per-vehicle fee collected for purposes of all regulation before Section 601 was enacted is somehow still justified after Section

601 disabled the MMCA and left the MPSC with far less authority than it possessed before.

Finally, even if the MPSC's safety regulatory authority were not so narrow, other factors also suggest that the MPSC cannot help but use the Intrastate Decal Fee for purposes wholly unrelated to its non-preempted regulation of Appellants' activities. Notably, the transportation of household goods remains subject to full economic regulation under the terms of Section 601, 49 USCA § 14501(c)(2)(B), yet MCL § 478.2(1); MSA 22.561(1) imposes only a $50 decal fee on vehicles used exclusively for the intrastate transportation of household goods. Therefore, the MPSC's continued economic regulatory authority over household goods transportation raises the obvious question of whether the $100 Intrastate Decal Fee imposed upon Appellants is being used by the MPSC to subsidize economic regulation of household goods carriers. In other words, Appellants should have been afforded the opportunity to conduct discovery to determine whether the Intrastate Decal Fee, just like the exempt carrier fee reviewed by the district court in Federal Express, supra, is "applied indiscriminately to the full range of ... regulatory activity," both preempted and non-preempted, after enactment of Section 601. 1993 WL 399380 at *7.

It is well established that, in addressing a motion for summary disposition, a trial court must give the benefit of the doubt to the non-movant and determine whether a record might be developed that would leave open an issue upon which reasonable minds might differ. Mahaffey v Attorney General, 222 Mich App 325, 340, 564 NW2d 104, 111 (1997). Moreover, summary disposition is premature if granted before discovery on a disputed issue is complete and if further discovery would stand a fair chance of uncovering factual support for the non-moving party's position. Great Lakes Gas Transmission Co. v MacDonald, 193 Mich App 571, 574-75, 485 NW2d 129, 131 (1992). The Court of Claims violated those principles in entering summary disposition in favor of Appellees because, as shown above, further discovery did stand

a fair chance of uncovering the type of factual record lacking in the In Re Federal Preemption case. In the absence of affording Appellants the opportunity to conduct that discovery, the Court of Claims wrongly concluded that In Re Federal Preemption is dispositive of Appellants' claim.

In short, Appellants could not have anticipated this Court's ruling in In re Federal Preemption when they first filed their motion for summary disposition in the Court of Claims, but they did preserve their right to respond to that ruling and demonstrate that the Intrastate Decal Fee cannot survive preemption scrutiny. Effective January 1, 1995, Congress's enactment of Section 601 made continued assessment of the Intrastate Decal Fee unlawful, and Appellants should be permitted on remand to prove just that. Summary disposition in favor of Appellees was improper and should be reversed.

(3)

No. 03-1250

Supreme Court, U.S.
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In The
Supreme Court of the United States

TROY CAB, INC., DEECO SERVICES, INC., d/b/a DEECO TRANSPORTATION, FRANK TIBERIO, d/b/a FAIRFIELD TOWING, LAFOND EXPRESS, INC., CALCUT SALES & SERVICES, INC., d/b/a CALCUT TRUCKING COMPANY, MID-CON FREIGHT SYSTEMS, INC., H & H ENTERPRISES, INC., d/b/a S & M CARTAGE, INC., ECONOMY TRANSPORT, INC., MASON & DIXON LINES, INC., ROMEO EXPEDITORS, INC., WESTLAKE TRANSPORTATION, INC., VANDERKOOI CARRIERS, INC., GERRIG'S TRUCKING & LEASING, INC. and BESTWAY EXPRESS, INC., individually and on behalf of all others similarly situated,

Petitioners,

v.

MICHIGAN PUBLIC SERVICE COMMISSION, MICHIGAN DEPARTMENT OF TREASURY, MICHIGAN DEPARTMENT OF COMMERCE, AND THE STATE OF MICHIGAN,

Respondents.

On Petition For A Writ Of Certiorari To The Michigan Court Of Appeals

PETITIONERS' REPLY TO BRIEF OF RESPONDENTS

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PETITIONERS' REPLY TO BRIEF OF RESPONDENTS

A. Petitioners Presented The Issue To The Michigan Court Of Appeals That Section 601 Preempted The Intrastate Fee Provisions Of The Michigan Motor Carrier Act.

The State of Michigan Respondents argue in their Brief in Opposition to this Petition for a Writ of Certiorari that the Supreme Court should not grant a review on the intrastate preemption issue, as they did not present that issue to the Michigan Court of Appeals. Yet, Petitioners' Brief, appended to the Brief in Opposition, makes evident that Petitioners did present the issue to the Michigan Court of Appeals. Particularly, Petitioners noted:

> Further, a $100 fee imposed annually on each vehicle used by a motor carrier engaged in the intrastate transportation of property cannot help but be 'related to a price, route, or service' of the motor carrier. As such, the Intrastate Decal Fee should have been captured by the preemptive net of Section 601.

(Respondents' App., 13b). Petitioners further stated:

> Indeed, the Intrastate Decal Fee stands as a direct roadblock to a motor carrier's very livelihood – the operation of its vehicles upon the highways of the state – and its continued assessment thus prompts the following question: If Congress intended to make entry into intrastate transportation markets easier by enacting Section 601, how can it be said that such a goal has been accomplished if motor carriers must still pay the *exact same* per-vehicle fee they paid before Section 601 went into effect? The answer to that question is apparent: It *cannot* be said that Congress's intent

> has been carried out because the MPSC has not dismantled the onerous financial barricade erected long before enactment of Section 601, and thus the *exact same* roadblock 'having a connection with or reference to' motor carrier prices, routes, and services continues to block Appellants' movement in the intrastate transportation market.

(Emphasis in original). (Respondents' App., 15b-16b).

In their Brief to the Michigan Court of Appeals, Petitioners called that tribunal's attention to the desire of Congress to enact "the broad preemptive interpretation" set forth in *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 112 S.Ct. 2031, 119 L.Ed.2d 157 (1992), a decision that interpreted the virtually identical preemptive language of the Airline Deregulation Act of 1978, Pub. L. No. 95-405, 92 Stat. 1707 (1978). (Respondents' App., p. 9b-10b). They further underscored that the intrastate decal fees in this case were similar to those struck down in *Federal Express Corporation v. California Public Utilities Commission*, 936 F.2d 1075 (9th Cir. 1991), *cert. denied*, 504 U.S. 979, 112 S.Ct. 2956, 119 L.Ed.2d 578 (1992), *on remand*, 1993 WL 399380 (N.D. Cal. 1993) (unpublished). (Respondents' App., 11b, 17b-18b). The exact language employed by the Congressional conferees was quoted for the Court of Appeals by Petitioners (Respondents' App., 9b, 17b).

Petitioners, then, did directly raise the Section 601 preemption issue before the Michigan Court of Appeals as an examination of their Brief indicates. This issue was preserved. The decision of the Michigan Court of Appeals to ignore these arguments (and wrongfully to conclude that the issue was not contested before it), a decision

which protected a continued stream of state fee revenue, deserves review by this Court, as that decision leaves in place a substantial burden on interstate commerce that Congress intended to remove through the enactment of Section 601.

B. The Challenged Intrastate Decal Fees Are Regulatory Fees, Not State Taxes.

Respondents allege at Page 21 of their Brief that the decal fees are protected, not from any language which occurs in Section 601 itself, but rather from a statement in the House Conference Report that:

> . . . nothing in this amendment is intended to change the application of state tax laws to motor carriers.

(House Conference Report, 103-677, p. 85, reprinted in 1994 USCCAN 1757, Petitioners' App., 85). However, Respondents ignore that Petitioners have challenged not a tax but "an annual **FEE** of $100 for each self-propelled motor vehicle operated by or on behalf of the motor carrier." MCL 478.2(1). (Petitioners' App., 103). (Emphasis supplied). This fee is assessed "for the administration of the Act." *Id.* It is not a tax. The Michigan Court of Appeals in fact analyzed whether this charge was "a permissible fee or an illegal tax." *Westlake Transportation, Inc. v. Michigan Public Service Commission*, 255 Mich.App. 589, 611, 662 N.W.2d 784 (2003) (Petitioners' App., 24). The court there concluded that " . . . we believe the exactions are most properly classified as ***regulatory fees***." *Id.* at 616. (Petitioners' App., 28). (Emphasis supplied). These economic regulatory fees, designed as they were to support a complicated economic regulatory structure for the Michigan intrastate motor carrier industry, have never been held to

be taxes and their continued validity is not protected by language in the Conference Report concerning state taxes for motor carriers.

C. Because Of The Onerous Intrastate Decal Fees, Michigan Never Leveled The Playing Field For Air And Ground Carriers, Thereby Thwarting The Congressional Intent Behind Section 601.

Respondents' Brief in Opposition ignores Petitioners' unassailable statement that Michigan, through continued imposition of this economic regulatory fee, has continued the uneven treatment for air and ground carriers that led to the passage of Section 601 in the first instance. This affront to Congressional purpose deserves attention from this Court.

Respondents allege that the Michigan Motor Carrier Act, MCL 475.1, *et seq.*, has "the dual purpose" of economic and safety regulation. In fact, safety was only a small component of the singular purpose of the MMCA, economic regulation, as Petitioners have pointed out in their Petition. All of those regulatory fees collected by Michigan, now in the tens of millions of dollars since Section 601 took effect on January 1, 1995, were designed to pay for a complicated system of economic regulation of which safety, once again, was merely a small component. However, the regulatory fees, as the court recognized in *Federal Express*, *supra*, were and are a significant burden on interstate commerce in and of themselves. The continued imposition of such fees on carriers such as United Parcel Service (a class member), while Federal Express and other similarly classified air carriers escape such fees, burdens interstate commerce just as did the regulation of price, routes, and service which the fees were designed to

support. Respondents even give lip service at Page 23 of their Brief in Opposition to the creation of a level playing field, while ignoring the fact that Respondents have not done so, by continuing to inflict this economic fee burden on ground carriers. The fee is an integral part of the economic regulation formerly imposed by Michigan. The fee should fall with the economic regulation. This issue is worthy of this Court's review.

D. The Residual Safety Regulatory Authority Of Michigan Is Over Vehicles, Not Carriers.

The limited safety authority left to Michigan as a result of the federal preemption is over motor vehicles, not carriers. Respondents argue that "this Court and Congress interchangeably used the phrase motor carriers and motor vehicles." (Respondents' Brief in Opposition, p. 31). Accordingly, in Respondents' view, it is permissible for states to continue to exercise safety authority over motor carriers and impose this regulatory fee on them, despite the language of Section 601. However, the ICC Termination Act of 1995, Pub. L. No. 104-88 (December 29, 1995), which contains Section 601, defines "motor vehicle" at 49 U.S.C. § 13102(14) as "a vehicle, machine, tractor, trailer, or semi-trailer propelled or drawn by mechanical power and used on a highway in transportation" while defining "motor carrier" at 49 U.S.C. § 13102(12) as "a person providing motor vehicle transportation for compensation." They are not the same. They are not used interchangeably. States may still regulate the safe operation of vehicles, including size or weight, hazardous materials and highway route controls, and, in the case of *motor carriers*, insurance requirements. However, the entities providing the transportation for compensation, the motor carriers

themselves, cannot be regulated in other respects. The fee falls on this ground, also.

E. Petitioners Presented Evidence Below In Opposition To Respondents' Motion For Summary Disposition, Which Evidence Was Ignored By The Lower Courts.

Respondents claim that Petitioners presented no evidence in opposition to the State's Motion for Summary Disposition below. Respondents have obviously overlooked large portions of the record, just as they overlook the fact that these challenged fees continue to preserve a bi-level playing field. Particularly, Petitioners submitted affidavits from Mickey Blashfield, Director of Governmental Relations of 11 of the named Plaintiffs (which group paid fees in excess of $50,000 annually), and John A. James, the long-time President (for 25 years) of another three of the named Plaintiffs (which group paid fees in excess of $20,000 annually), as well as one report from the State of Michigan Senate Fiscal Agency on motor carrier revenues and expenses and another report entitled *Truck Safety and Economic Regulation of the Trucking Industry* authored by the Michigan Department of Commerce Office of Policy and Legislative Affairs (November 1992), in addition to the state-by-state intrastate fees comparison prepared by the American Trucking Associations, Inc. (Petitioners' App., 105-110). That fee comparison was later updated to the Michigan Court of Claims revealing that West Virginia, the only state which had exceeded Michigan's fee level, had dropped its fees to $3.00 per vehicle per year. There was evidence of record then which directly contradicted those arguments posited in the Respondents' Motion, although the Court of Claims ignored such evidence so

that this state's revenue stream would be protected despite the federal preemption.

CONCLUSION

Millions of dollars in fees continue to be assessed under a state economic regulatory statute from the 1930's, even though Congress preempted these economic regulatory statutes effective January 1, 1995. This matter can be rectified only if this Court grants this Petition for Writ of Certiorari.

Respectfully submitted,

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Nos. 03-1230, 03-1234, and 03-1250

In the Supreme Court of the United States

AMERICAN TRUCKING ASSOCIATIONS, INC., AND USF HOLLAND, INC., PETITIONERS

v.

MICHIGAN PUBLIC SERVICE COMMISSION, ET AL.

MID-CON FREIGHT SYSTEMS, INC., ET AL., PETITIONERS

v.

MICHIGAN PUBLIC SERVICE COMMISSION, ET AL.

TROY CAB, INC., ET AL., PETITIONERS

v.

MICHIGAN PUBLIC SERVICE COMMISSION, ET AL.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE MICHIGAN COURT OF APPEALS

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

The State of Michigan imposes upon motor carriers licensed in that State a $100 annual fee for each vehicle registered in the State and "operating entirely in interstate commerce." Mich. Comp. Laws Ann. § 478.2(2) (West 2002). Michigan also imposes upon motor carriers a $100 annual fee for each vehicle that operates at least in part in intrastate transportation. *Id.* § 478.2(1). The questions presented are:

(1) Whether the $100 fee upon vehicles operating solely in interstate commerce is preempted by 49 U.S.C. 14504.

(2) Whether the $100 fee upon vehicles conducting intrastate operations violates the Commerce Clause of the United States Constitution.

(3) Whether the $100 fee upon vehicles conducting intrastate operations is preempted by 49 U.S.C. 14501.

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This brief is submitted in response to the orders of this Court inviting the Acting Solicitor General to express the views of the United States. Because all three petitions challenge the same decision of the Michigan Court of Appeals, this consolidated brief responds to all of the Court's orders.

STATEMENT

1. a. In 1965, Congress authorized States to impose registration requirements on interstate motor carriers operating within their borders. 49 U.S.C. 302(b)(2) (1970). Congress determined that such requirements would not constitute undue burdens on interstate commerce insofar as they were consistent with regulations promulgated by the Interstate Commerce Commission (ICC). *Ibid.*; *Yellow Transp., Inc.* v. *Michigan*, 537 U.S. 36, 39 (2002).

Until 1994, the ICC permitted each State to charge an interstate motor carrier operating within its borders an annual registration fee of up to $10 per vehicle. 49 C.F.R. 1023.33 (1992). This became known as the "bingo card" system because each State issued a stamp for each vehicle, and the motor carrier affixed the stamp to a card carried in the vehicle, as proof of registration. 49 C.F.R. 1023.32 (1992); *Yellow Transp.*, 537 U.S. at 39.

In order to reduce administrative burdens on motor carriers, Congress directed the ICC in 1991 to implement a new system, called the Single State Registration System (SSRS), under which each motor carrier "register[s] annually with only one State." 49 U.S.C. 14504(c)(1)(A).[1] Under the SSRS, each State may still charge a fee, "equal to the

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[1] The 39 States that participated in the bingo card system as of January 1, 1991, are eligible to participate in the SSRS. 49 U.S.C. 14504(c)(2)(D). The 11 ineligible States are listed in H.R. Rep. No. 171, 102d Cong., 1st Sess. Pt. 1, at 49 (1991). Oregon is eligible to participate but does not do so. Thus, 38 States participate in the single-state program.

fee, not to exceed $10 per vehicle, that such State collected or charged as of November 15, 1991." 49 U.S.C. 14504(c)(2)(B)(iv)(III). Those fees are collected and distributed to other States by the single State in which the vehicle is registered. 49 C.F.R. 367.6(a).

Congress determined that "[t]he charging or collection of any fee under this section that is not in accordance with th[is] fee system * * * shall be deemed to be a burden on interstate commerce." 49 U.S.C. 14504(c)(2)(C). When Congress abolished the ICC in 1995, it assigned authority to administer the SSRS to the Secretary of Transportation. *Yellow Transp.*, 537 U.S. at 39-40 n.* (citing Pub. L. No. 104-88, 109 Stat. 803).

b. Section 601 of the Federal Aviation Administration Authorization Act of 1994 (FAAAA), Pub. L. No. 103-305, 108 Stat. 1605, forbids a State from "enact[ing] or enforc[ing] a law, regulation, or other provision * * * related to a price, route, or service of any motor carrier * * * with respect to the transportation of property." 49 U.S.C. 14501(c)(1). Congress enacted that provision out of concern that "'the regulation of intrastate transportation of property by the States' unreasonably burdened free trade, interstate commerce, and American consumers." *City of Columbus* v. *Ours Garage & Wrecker Serv., Inc.*, 536 U.S. 424, 440 (2002) (quoting § 601(a)(1), 108 Stat. 1605). Congress specified that Section 601 does not restrict "the safety regulatory authority of a State with respect to motor vehicles," the "authority of a State to regulate motor carriers with regard to minimum amounts of financial responsibility relating to insurance requirements," or other regulatory authority regarding the transportation of household goods or non-consensual tow truck services. 49 U.S.C. 14501(c)(2).

2. Michigan imposes three relevant fees on motor carriers. First, under the SSRS, Michigan charges interstate carriers operating in Michigan a maximum annual fee of $10

for each truck licensed in *another* State. Mich. Comp. Laws Ann. § 478.7(4) (West 2002).[2] That fee is not at issue here. Second, "[a] motor carrier licensed in [Michigan] shall pay an annual fee of $100.00 for each vehicle operated by the motor carrier *which is registered in [Michigan]* and operating entirely in interstate commerce." *Id.* § 478.2(2) (the "interstate fee") (emphasis added). Third, Michigan also charges an annual fee of $100 "for each self-propelled motor vehicle operated by or on behalf of [a] motor carrier." Mich. § 478.2(1) (the "intrastate fee"). In practice, Michigan assesses that fee only on trucks that engage in whole or in part in intrastate operations in Michigan. 03-1234 Br. in Opp. App. 8b.

3. In 1995, petitioner Westlake Transportation brought a class action against respondents, alleging that the $100 intrastate and interstate fees are preempted by 49 U.S.C. 14501 and 14504. Shortly thereafter, petitioner Troy Cab and other petitioners filed a class action making similar allegations, and petitioners American Trucking Associations and USF Holland filed suit alleging that the intrastate fee violates the Commerce Clause of the United States Constitution, Art. I, § 8, Cl. 3. After all of the petitioners amended their complaints to adopt each others' claims, the Michigan Court of Claims consolidated the cases, certified the classes, and granted summary disposition to respondents. 03-1234 Pet. App. 36- 72.

The Court of Claims determined that the $100 interstate fee is not preempted by federal law because the SSRS "places a $10.00 annual vehicle fee limit on only the 'participating states,' * * * not on the 'registering state,'" and Michigan's $100 interstate fee applies only to vehicles registered in Michigan. 03-1234 Pet. App. 46; accord *id.* at

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[2] As explained above, under the SSRS, that fee is actually collected by the State in which the carrier is registered and then paid over to Michigan. See pp. 1-2, *supra*.

68-69. The court also upheld the intrastate fee against petitioners' Commerce Clause challenge because the fee applies only to carriers that choose to engage in point-to-point transportation of property within Michigan, and the fee was intended to ensure that vehicles and carriers that provide intrastate service on Michigan highways comply with Michigan's safety and fitness norms. *Id.* at 48-49. Finally, the court held that Section 601 of the FAAAA does not preempt the intrastate fee, noting that Michigan has not used the fees to engage in preempted economic regulation. *Id.* at 44-45.

4. The Michigan Court of Appeals affirmed. 03-1234 Pet. App. 1-35. The Court of Appeals disagreed with the Court of Claims' conclusion that the SSRS imposes no limit on fees charged by the States in which the carrier is registered. "A registration state is simply a participating state in which a motor carrier is registering," the court explained, and the federal statute draws no distinction between the two. *Id.* at 15. Nonetheless, the court held that the interstate fee is not preempted under the SSRS (or the predecessor bingo card system) because it "could reasonably be classified as a regulatory fee," as opposed to a "registration fee." *Id.* at 16; accord *id.* at 19. The court concluded that "[i]f the purpose of a fee is to regulate an industry or service, it can be properly classified as a regulatory fee" exempt from federal preemption. *Id.* at 16-17.

Turning to the intrastate fee, the Court of Appeals concluded that the fee "affects interstate commerce, and thus, implicates the dormant Commerce Clause." 03-1234 Pet. App. 32. The court nonetheless upheld the fee on the theory that it "regulates even-handedly." *Id.* at 34. The court acknowledged petitioners' contention that the fee discriminates against interstate commerce because carriers that travel both intrastate and interstate "invariably will pay a higher per-mile fee than the carrier who operates solely

intrastate," but the court deemed that point insignificant because petitioners "present[ed] no evidence that any trucking firm's route choices are affected by the imposition of the fee." *Id.* at 33-34. The court distinguished this Court's decision in *American Trucking Ass'ns* v. *Scheiner*, 483 U.S. 266 (1987)—which held two unapportioned flat taxes on interstate trucking carriers to be unconstitutional—on the theory that *Scheiner* applies only to taxes for the privilege of doing business in the State, not to "regulatory statutes." 03-1234 Pet. App. 32 n.15.

The Court of Appeals also held that the intrastate fee is not preempted by Section 601 of the FAAAA because there is no evidence that Michigan uses the fees to fund the enforcement of preempted regulations of rates, routes, or services. 03-1234 Pet. App. 21. The court rejected petitioners' argument that the Court of Claims erred by limiting discovery and briefing on that issue. *Id.* at 22-23.

5. The Michigan Supreme Court denied petitioners' application for leave to appeal. 03-1234 Pet. App. 73-75.

DISCUSSION

The $100 fee imposed by Section 478.2(2) of the Michigan statute on carriers that operate solely in interstate commerce is precisely the type of burden on interstate commerce that is prohibited by the Single State Registration System established under 49 U.S.C. 14504. The Michigan Court of Appeals' contrary holding opens a significant loophole in the SSRS, and undermines Congress's efforts to reduce financial and administrative barriers to interstate commerce. Although the separate $100 fee imposed by Section 478.2(1) of the Michigan statute on carriers that engage in at least some point-to-point intrastate transportation in Michigan does not directly implicate the federal statutory scheme, the Court of Appeals' rationale for upholding Section 478.2(1) against dormant Commerce Clause scrutiny is incorrect and difficult to square with decisions of this

Court and the highest courts of other States. If that erroneous rationale is rejected by this Court, however, the validity of the $100 flat fee on interstate carriers that engage in intrastate commerce within Michigan nonetheless presents a difficult and unresolved question that calls for reconciliation of two different strands of this Court's Commerce Clause jurisprudence. Accordingly, the petitions for writs of certiorari in Nos. 03-1234 (Mid-Con) and 03-1230 (American Trucking Associations) should be granted. The petition in No. 03-1250 (Troy Cab) should not be granted because it does not present a substantial question warranting review by this Court.

A. The Court Should Review The Validity Of Michigan's $100 Interstate Fee

By holding that Michigan's $100 fee on carriers that engage only in interstate commerce is not preempted by the SSRS, the Court of Appeals erred on an important question of federal law.

1. Congress enacted the SSRS against the backdrop of this Court's dormant Commerce Clause jurisprudence, which generally prohibits States from discriminating against interstate commerce or otherwise imposing undue burdens on such commerce. See, *e.g.*, *Brown-Forman Distillers Corp.* v. *New York State Liquor Auth.*, 476 U.S. 573, 579 (1986). Congress determined that requirements that motor carriers engaging in interstate commerce must register with a State, or pay fees for that privilege, would impose undue burdens on interstate commerce *unless* they were undertaken pursuant to the SSRS. 49 U.S.C. 14504(b) ("When a State registration requirement imposes obligations in excess of the standards of the Secretary, the part in excess is an unreasonable burden."); 49 U.S.C. 14504(c)(2)(C) ("The charging or collection of any fee under this section that is not in accordance with th[is] fee system * * * shall be deemed to be a burden on interstate commerce.").

Under the SSRS, a motor carrier is required to register with only one State, and only that State may collect fees on behalf of itself and other participating States. 49 U.S.C. 14504(c)(1)(A) and (2)(A)(iii). The fees are allocated among the participating States in which the carrier operates, 49 C.F.R. 367.6(a), and the amount of the fee collected on behalf of any participating State is "*not to exceed $10 per vehicle.*" 49 U.S.C. 14504(c)(2)(B)(iv)(III) (emphasis added).

The $100 fee imposed by Michigan on carriers engaged solely in interstate commerce in Michigan does not satisfy those requirements. Although Michigan complies with the SSRS with respect to vehicles licensed in *other* States, see Mich. Comp. Laws Ann. § 478.7(4), the $100 fee for vehicles licensed in Michigan is ten times the $10 permitted under the SSRS. As the Court of Appeals correctly recognized, the SSRS draws no distinction between fees charged by the State of registration and fees charged by other States. 03-1234 Pet. App. 15. The $10 cap applies to *every* "participating State," 49 U.S.C. 14504(c)(2)(B)(iv)(III), including the one in which a carrier registers. See 03-1234 Pet. App. 15 ("A registration state is simply a participating state in which a motor carrier is registering."); 49 C.F.R. 367.3(a) ("Each motor carrier required to register and pay filing fees must select a single participating State as its registration State."). Because the $100 interstate fee is prohibited by the SSRS, it is preempted.

The Court of Appeals attempted to elide that conclusion by asserting that the SSRS preempts only "registration" fees, as opposed to "regulatory" fees, and that "the $100 interstate fee could reasonably be classified as a regulatory fee because it is a fee imposed for the administration of [state law]." 03-1234 Pet. App. 16. The court based that conclusion on a state court decision distinguishing between "user fee[s]" and "tax[es]" for purposes of a state-law restriction on the imposition of new taxes by units of local gov-

ernment. *Ibid.* (citing *Bolt* v. *Lansing*, 587 N.W.2d 264, 268 (Mich. 1998)). That state-law distinction is irrelevant to the *federal* question here, and nothing in Section 14504 limits the statute's reach to "registration" fees or fees given any other specific label. Nor does anything in the statute exclude fees dubbed "regulatory." Instead, it prohibits "[t]he charging or collection of *any* fee under this section that is not in accordance with" the SSRS. 49 U.S.C. 14504(c)(2)(C) (emphasis added).

In light of that broad and inclusive statutory language, there is no question the interstate fee is covered by Section 14504. The fee is charged to motor carriers licensed in Michigan for every vehicle "registered in this state and operating entirely in interstate commerce." Mich. § 478.2(2). Because the fee is imposed *solely for registering* to participate in interstate commerce, it is hard to characterize it as anything other than a "registration fee," and in any event it is precisely the type of fee Congress sought to regulate. Indeed, Michigan "waives" the lawful $10 interstate "registration fee" for every truck for which the carrier pays the unlawful $100 fee. 03-1234 Pet. App. 16 n.6. As this practice reflects, the only difference between the SSRS fee and the Michigan interstate fee is the amount.

Moreover, when an interstate carrier pays the $100 fee under Section 478.2(2), respondents assign the carrier a decal that it must display as proof of payment. 03-1234 Br. in Opp. App. 10b. That requirement independently violates the SSRS's prohibition against "decals, stamps, cab cards, or any other means of registering or identifying specific vehicles operated by a motor carrier," 49 C.F.R. 367.5(g); see 49 U.S.C. 14504(c)(2)(B)(iii)—and thereby provides further confirmation that Michigan's interstate fee is the type of fee the SSRS prohibits.

The Court of Appeals erred by relying on repealed ICC regulations, which predated the SSRS, for the proposition

that a State may collect taxes and fees to defray regulatory and law-enforcement costs. 03-1234 Pet. App. 17-18 (citing 49 C.F.R. 1023.104 (1991); 49 C.F.R. 1023.105 (1991)). The question here is not whether a State may impose *any* taxes or fees on motor carriers; instead, the question is whether it may impose fees covered by the SSRS in excess of the amounts permitted by the SSRS. If a State could do so, the SSRS fee caps would be a dead letter.[3]

2. The validity of Michigan's interstate fee warrants this Court's review. Barriers to interstate commerce harm the national economy, contrary to the Framers' intent to create a nationwide "area of trade free from interference by the States." *American Trucking Ass'ns* v. *Scheiner*, 483 U.S. 266, 280 (1987) (quoting *Boston Stock Exch.* v. *State Tax Comm'n*, 429 U.S. 318, 328 (1977)). Congress has twice recognized the importance of minimizing barriers to interstate trucking, first when it enacted the bingo card system, and later when it replaced that system with the SSRS. 49 U.S.C. 302(b)(2) (1970); 49 U.S.C. 14504(b) and (c)(2)(C); see *Yellow Transp.*, 537 U.S. at 39-40. The decision below strikes at the heart of Congress's design by sanctioning increased monetary and administrative barriers to the conduct of interstate commerce. This Court has granted certiorari in numerous other cases raising similar interstate commerce concerns, even in the absence of an asserted conflict among appellate courts. See, *e.g.*, *Hillside Dairy, Inc.* v. *Lyons*, 539 U.S. 59 (2003); *Camps Newfound/Owatonna, Inc.* v. *Town of Harrison*, 520 U.S. 564 (1997); *General Motors* v. *Tracy*, 519 U.S.

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[3] States remain free to collect other taxes and exactions, such as fuel taxes and tolls, that are related to the extent of a carrier's use of their roads. In contrast to the flat fee at issue here, imposed solely for registration to engage in interstate commerce, those taxes do not fall within the scope of Section 14504. Nor do such charges burden interstate commerce to the extent that flat fees do. See pp. 12-13, 16-17, *infra*.

278 (1997); *Trinova Corp.* v. *Michigan Dep't of Treasury*, 498 U.S. 358 (1991); *Scheiner*, *supra*.

In this case, moreover, there is a division in authority because other courts have correctly rejected efforts to circumvent the fee cap. 03-1234 Pet. 18. Especially apposite is *State ex rel. Sammons Trucking Inc.* v. *Boedecker*, 492 P.2d 919, 919-920 (Mont. 1972), where the Supreme Court of Montana held that a $10 "license fee" was preempted by the bingo card system, which imposed a $5 cap at the time. Respondents contend (03-1234 Br. in Opp. 15) that *Boedecker* is distinguishable because it involved a "*registration* fee" as opposed to a "*regulatory* fee." As explained above (see pp. 7-8, *supra*), 49 U.S.C. 14504 does not draw such a distinction.[4] In any event, the fee imposed by Michigan is as much a registration fee as the one in *Boedecker*. The fee is imposed on carriers that are licensed in Michigan for each vehicle that is "*registered* in the state and operating entirely in interstate commerce." Mich. § 478.2(2) (emphasis added); see p. 8, *supra*.

Thus, the validity of the "regulatory fee"/"registration fee" distinction is part and parcel of the issue on which courts have divided.[5] If the distinction between regulatory and registration fees has no role to play in a proper interpretation of the statute, then it equally provides no basis to distinguish *Boedecker*. Moreover, that illusory distinction serves only to underscore the mischief the decision below could cause. If other States attempted to exempt themselves from the SSRS by invoking the "regulatory fee" label, "commerce among the States would be deterred." *Scheiner*, 483 U.S. at 284. Review in No. 03-1234 is therefore warranted.

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[4] The court in *Boedecker* actually referred to the fee as a "license fee," 492 P.2d at 919, and it did not attach significance to nomenclature.

[5] Courts have also divided on the validity of the distinction in evaluating Commerce Clause claims. See pp. 14-15, *infra*.

3. If the Court grants review, however, it might wish to reformulate the question presented by limiting it to whether the SSRS preempts the fee imposed by Section 478.2(2). Petitioners' question encompasses both whether the SSRS preempts the interstate fee *and* whether the predecessor bingo card system had that effect before it was repealed a decade ago, in 1994. 03-1234 Pet. i. Although a similar analysis applies to both the SSRS and the bingo card system, and an understanding of the bingo card system provides helpful background for understanding the SSRS, the two sets of statutes and regulations are worded differently.[6] The preemptive effect of the bingo card system has some importance to the parties to this case because petitioners have sought a refund of fees paid before 1994 (03-1234 Pet. 7-8), but it does not appear to have any other ongoing significance.

B. The Validity Of Michigan's $100 Intrastate Fee Under The Commerce Clause Also Warrants This Court's Review

Petitioners in No. 03-1230 contend that the fee imposed by Section 478.2(1) of the Michigan statute is unconstitutional as applied to carriers that conduct both interstate and

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[6] Congress authorized the ICC to promulgate standards regarding registration and identification of vehicles operating interstate, and provided that requirements in excess of those standards would constitute an undue burden on interstate commerce. 49 U.S.C. 302(b)(2) (1970). The ICC's standards established the bingo card system described at p. 1, *supra*, and, at the times relevant to this case, specified that the fee for issuance of an identification stamp "shall not exceed $10." 49 C.F.R. 1023.33 (1992). Both the statute and the regulations stressed that they should not "be construed to affect the powers of taxation of the several States." 49 U.S.C. 302(b)(1) (1970); see 49 C.F.R. 1023.104 (1992). Although it might be contended that the latter provisions make the federal preemption issue different under the bingo card system than under the SSRS, the interstate fee was preempted under the bingo card system because it was precisely the type of fee regulated by that system, and it exceeded the lawful amount.

intrastate operations. 03-1230 Pet. i. In our view, that issue also warrants this Court's review.

1. The fee imposed by Section 478.2(1) affects interstate commerce. Interstate carriers that transport even one load between two points in Michigan, as part of their overall interstate operations, are assessed the full $100 intrastate fee. Thus, a truck that is passing through Michigan, in the course of an interstate haul, cannot "top off" by transporting an additional load between two points within the State unless it has paid the $100 fee. Similarly, a truck that has just completed an interstate delivery in Michigan cannot make a haul between two points in Michigan on its return trip unless it has paid the full $100 annual fee. See generally 03-1234 Pet. App. 34. As the Court of Appeals correctly recognized, the $100 fee "affects interstate commerce, and thus, implicates the dormant Commerce Clause." *Id.* at 32; see *Camps Newfound/Owatonna*, 520 U.S. at 573; *Commonwealth Edison Co.* v. *Montana*, 453 U.S. 609, 615-617 (1981).

2. Under the Commerce Clause, a state tax is constitutional insofar as it "is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State." *Oklahoma Tax Comm'n* v. *Jefferson Lines, Inc.*, 514 U.S. 175, 183 (1995) (quoting *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274, 279 (1977)). Petitioners contend (03-1230 Pet. 7-17, 20-27) that the fee imposed by Section 478.2(1) violates that test because it is not fairly apportioned and it discriminates against interstate commerce.

Petitioners rely in particular on *Scheiner*, *supra*. See 03-1230 Pet. 8-17. In that case, the Court held that two flat taxes (an identification marker fee and an axle tax) imposed by Pennsylvania on interstate trucking carriers for the privilege of using the Commonwealth's highways were unconstitutional, noting that "[i]f each State imposed flat taxes for

the privilege of making commercial entrances into its territory, there is no conceivable doubt that commerce among the States would be deterred." 483 U.S. at 284. The Court explained that the "inevitable effect" of such taxes "is to threaten the free movement of commerce by placing a financial barrier around the State." *Ibid.* The Court distinguished such flat taxes from other exactions, such as fuel taxes, that are fairly apportioned because they are related to the carrier's actual usage of a State's roads, and thereby "maintain state boundaries as a neutral factor in economic decisionmaking." *Id.* at 283.[7]

3. Because the Michigan statute imposes a flat fee of $100 per vehicle for the privilege of doing business within the State, regardless of the amount of intrastate transportation a vehicle actually performs in the State, petitioners contend that its impact is similar to that of the taxes struck down in *Scheiner*. The Michigan Court of Appeals held that *Scheiner* is inapposite on the ground that this case involves what the court characterized as "regulatory statutes," as opposed to "state-taxation statutes that tax interstate commerce itself, i.e., taxes for the privilege of doing business in the state." 03-1234 Pet. App. 32 n.15 (citation omitted). This Court, however, has rejected "the old absolutism" that proscribed "taxation formally levied on interstate commerce." *Jefferson Lines*, 514 U.S. at 183. What matters is "not the formal language of the tax statute but rather its practical effect." *Ibid.* In substance and effect, the distinction drawn by the

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[7] *Scheiner* drew on "[a] line of cases invalidating unapportioned flat taxes." 483 U.S. at 284 n.16. In *Nippert* v. *Richmond*, 327 U.S. 416 (1946), for example, this Court re-affirmed its cases holding flat fees imposed on solicitors or "drummers" (essentially salespersons) acting on behalf of interstate concerns to be unconstitutional. The Court explained that because such taxes bear "no relation to the volume of business done or of returns from it," their burden "will be felt more strongly by the out-of-state itinerant than by the one who confines his movement within the State." *Id.* at 427, 430.

Court of Appeals is meaningless: the intrastate fee is in effect a tax "for the privilege of doing business in the state" because an interstate carrier cannot make intrastate hauls in the State without paying the fee; whether the fee is characterized as "regulatory" has no bearing on its practical effect.

The Court of Appeals' attempt to distinguish *Scheiner* by characterizing the fee as "regulatory" brought it into conflict with the highest courts of New Jersey, Maine, and Massachusetts. Each of those courts expressly rejected the distinction between "regulatory fees" and other sorts of fees or taxes, and each held that a flat tax on the transportation of hazardous waste was unconstitutional under *Scheiner* as a matter of law. *American Trucking Ass'ns* v. *New Jersey*, 852 A.2d 142, 164 (N.J. 2004); *American Trucking Ass'ns* v. *Secretary of State*, 595 A.2d 1014, 1015-1017 (Me. 1991); *American Trucking Ass'ns* v. *Secretary of Admin.*, 613 N.E.2d 95, 99 n.9, 101-103 (Mass. 1993).[8]

In contrast, other courts have credited the erroneous "regulatory fee" distinction relied upon by the Michigan court. See, *e.g.*, *Franks & Son, Inc.* v. *Washington*, 966 P.2d 1232, 1240 (Wash. 1998) (citing cases); cf. *New Jersey*, 852

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[8] Respondents seek to distinguish those cases on the ground that the fees at issue applied to both intrastate and interstate movements of hazardous waste, whereas the Michigan fee applies only to intrastate shipments. See 03-1230 Br. in Opp. 25. As explained at pp. 16-17, *infra*, that distinction is debatable as applied to interstate trucking carriers. The important point for present purposes is that although the decisions cited in the text held that *Scheiner* applies to state exactions whether they are characterized as "regulatory" fees or some other sort of fee or tax, the Michigan Court of Appeals embraced that very distinction and held *Scheiner* (and *Complete Auto*) inapplicable solely because it regarded Section 478.2(1) as a regulatory statute. See 03-1234 Pet. App. 32 n.15. It is perhaps significant, moreover, that the New Jersey, Maine, and Massachusetts courts did not strike down the fees only as applied to movements solely in interstate commerce, as the logic of respondents' distinction would seem to dictate. See 595 A.2d at 1018 (declaring fee unconstitutional in its entirety); 613 N.E.2d at 105 (same); 852 A.2d at 145, 167 (declaring fee unconstitutional as applied to out-of-state companies).

A.2d at 162-163 (recognizing the conflict and deepening it by "respectfully disagree[ing]" with *Franks & Son* and other cases).

4. Although the Court of Appeals erred—and departed from decisions of other appellate courts—by relying on the "regulatory fee" distinction, respondents argue (03-1230 Br. in Opp. 17, 22) that *Scheiner* poses no barrier to their collection of the fee for a different reason: that while the taxes at issue in *Scheiner* applied to all trucks traveling within the State, the fee imposed by Section 478.2(1) applies only to trucks undertaking at least some point-to-point intrastate hauls in Michigan, and presents no danger of multiple taxation of those hauls.

That contention finds support in an older line of this Court's cases that subjected flat taxes on transportation companies' intrastate routes to more relaxed scrutiny than taxes on their interstate routes. In *Osborne* v. *Florida*, 164 U.S. 650, 653-654 (1897), for example, this Court assumed that a flat license tax on express companies would have been unconstitutional if applied to companies undertaking solely interstate deliveries, but upheld the tax as applied to companies undertaking both intrastate and interstate deliveries on the theory that the State could tax the intrastate activity. Noting that a "company cannot complain of being taxed for the privilege of doing a local business which it is free to renounce," the Court likewise upheld a partially-flat tax against companies operating railroad sleeping cars that carried both intrastate and interstate passengers in the same cars. *Pullman Co.* v. *Adams*, 189 U.S. 420, 422 (1903).[9]

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[9] The Court similarly upheld a flat tax on all vehicles using Illinois' highways on the theory that "each of the [plaintiff] interstate carriers does an intrastate business as well," and "[n]o effort is made to show that * * * the tax is increased by reason of the interstate operations of any appellant." *Bode* v. *Barrett*, 344 U.S. 583, 585 (1953); cf. *City of Chicago* v. *Willett Co.*, 344 U.S. 574, 580 (1953) (upholding flat tax on trucks used to

The continued vitality of those older decisions may be subject to question in light of this Court's decisions in *Complete Auto* and *Scheiner*, which overruled a number of earlier formalist decisions in favor of a more practical framework focusing on the actual effect of a tax. See 430 U.S. at 287-289; 483 U.S. at 292-296. Under this Court's modern precedents, Michigan's fee is constitutional only if it is fairly apportioned, non-discriminatory, and fairly related to the services provided by the State. *Jefferson Lines*, 514 U.S. at 183.[10] *Scheiner* determined that the unapportioned flat taxes at issue in that case were "blatantly discriminatory" and not "even hand[ed]" as applied to out-of-state trucking carriers because they bore no relationship to a carrier's actual use of the State's roads, and thereby "threaten[ed] the free movement of commerce by placing a financial barrier around the State." 483 U.S. at 282, 284, 292; see pp. 12-13, *supra*. Similar concerns may be raised by Michigan's intrastate fee under Section 478.2(1) insofar as it is imposed on carriers engaged in interstate as well as intrastate commerce, because the cost-per-mile incurred by those carriers for engaging in intrastate commerce within Michigan would generally be higher than the cost-per-mile incurred by wholly intrastate carriers for engaging in the same commerce. Cf. *Scheiner*, 483 U.S. at 276, 286, 296-297. The effect could be to place interstate carriers at a competitive disadvantage if they sought to "top off" an interstate load or haul a load between two points in Michigan after completing (or before commencing) an interstate haul. The carrier's interstate transportation could also be adversely affected as a result. The

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carry intrastate and interstate loads simultaneously based on the "central and decisive fact" that the business was based in the taxing jurisdiction).

[10] The less demanding test applied to health, safety, and other regulations that impose only "incidental burdens" on interstate commerce likewise requires that a State regulate "evenhandedly." *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

record, however, does not fully establish the extent of any such competitive disadvantage or burden on interstate commerce.[11]

5. However the Court might ultimately resolve any tension between *Scheiner* and the *Osborne* line of cases—and the United States has not arrived at a definitive position on that point—the question presented in No. 03-1230 warrants review. That is especially so because the Michigan Court of Appeals erred by resolving that question by characterizing the fees at issue as "regulatory," and because there is a need for this Court's review of the related question of the validity of Michigan's interstate fee under the SSRS. Indeed, Congress's determination in the SSRS that a fee exceeding $10 for interstate hauls would unduly burden interstate commerce suggests that a charge ten times that amount for "topping off" an interstate load warrants review by the Court. As noted above, this Court has repeatedly granted review in dormant Commerce Clause cases even in the absence of a conflict in the lower courts, and in this instance the lower courts are in need of guidance. See pp. 9-10, 14-15, *supra*.

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[11] An affidavit submitted on behalf of petitioner USF Holland (then called TNT Holland Motor Express) states that the company's trucks often supplement their interstate loads by either topping off those loads with intrastate loads, or by hauling intrastate loads between interstate loads. 03-1234 Pet. App. 34. That affidavit suggests that in this inherently mobile industry, interstate and intrastate routes may often be undertaken together as part of a carrier's overall interstate operations. The record does not, however, reflect the overall extent to which Michigan's flat fee actually deters out-of-state carriers from competing for intrastate hauls in Michigan, or the extent to which the fee otherwise affects out-of-state carriers disproportionately or burdens interstate commerce. Accordingly, if the Court grants review in No. 03-1230 and articulates a general framework for analyzing fees such as the one imposed by Section 478.2(1) under the Commerce Clause, the Court may find it appropriate then to remand this case to the Michigan courts for application of that framework, including the development of any further factual record that may be necessary.

C. The Petition In No. 03-1250 Does Not Warrant Certiorari

The petition in No. 03-1250 presents the question whether Michigan's intrastate fee, as applied to *all* carriers conducting intrastate hauls—solely intrastate and mixed carriers alike—is preempted by Section 601 of the FAAAA. That statute prohibits a State from enacting or enforcing any law "related to a price, route, or service of any motor carrier * * * with respect to the transportation of property." 49 U.S.C. 14501(c)(1). Congress enacted that provision to end economic regulation of the trucking industry. See *City of Columbus* v. *Ours Garage & Wrecker Serv., Inc.*, 536 U.S. 424, 440 (2002). Although Section 601's preemption of economic regulation is broad and important,[12] we do not believe the petition presents a sufficiently substantial issue to warrant review.

In general, the mere levying of a fee is not "related to a price, route, or service of any motor carrier" for purposes of Section 601. 49 U.S.C. 14501(c)(1). In theory, *any* tax or fee might cause a carrier to raise its price or alter its operations, but the same could be said of safety or insurance requirements, or other non-economic regulations, and Congress made clear that it did not intend to sweep so far. See 49 U.S.C. 14501(c)(2) (exempting safety regulation, insurance requirements, and other matters from the scope of Section 601). Without more, therefore, any connection between the assessment of a fee and the prices, rates, or services of a carrier is "too tenuous, remote, or peripheral" to give rise to preemption. *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374, 390 (1992).

---

[12] Congress modeled Section 601 on a similar provision of the Airline Deregulation Act of 1978, Pub. L. No. 95-504, § 4, 92 Stat. 1708, which this Court has described as "express[ing] a broad pre-emptive purpose." *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374, 383 (1992); see H.R. Conf. Rep. No. 677, 103d Cong., 2d Sess. 83 (1994).

Petitioners contend (03-1250 Pet. 16-17) that because Michigan imposed the intrastate fee in support of economic regulation before Congress enacted Section 601, it must now repeal that fee along with the other aspects of its economic regulatory regime. There is no apparent basis for this "guilt by association" theory. Michigan would violate Section 601 if, for example, it were to regulate the prices charged by trucking companies, but that does not mean that otherwise lawful fees charged before deregulation may not be charged after deregulation to support government programs that remain lawful, including safety programs. A different case might be presented if the fee substantially exceeded the amount Michigan required to administer lawful programs, but petitioners failed to develop a record below showing that the fee is not related to a permissible purpose.

It might also be argued that although the fee is lawful as applied to carriers that conduct solely intrastate operations in Michigan, it is preempted as applied to interstate carriers because the fee acts as a barrier to entry, and thereby affects "routes" and inhibits interstate operators from offering "services" for intrastate hauls. But none of the petitioners presented that distinct claim in the state courts or in their petitions to this Court. As a result, it is not suitable for review in this case.

CONCLUSION

The petition for a writ of certiorari in No. 03-1234 should be granted, limited to the question whether the fee imposed by Mich. Comp. Laws Ann. § 478.2(2) is preempted by 49 U.S.C. 14504. The petition for a writ of certiorari in No. 03-1230 should be granted. The petition for a writ of certiorari in No. 03-1250 should be denied.

Respectfully submitted.

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DECEMBER 2004

(6)

No. 03-1250

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In The
Supreme Court of the United States

TROY CAB, INC., DEECO SERVICES, INC., d/b/a DEECO TRANSPORTATION, FRANK TIBERIO, d/b/a FAIRFIELD TOWING, LAFOND EXPRESS, INC., CALCUT SALES & SERVICES, INC., d/b/a CALCUT TRUCKING COMPANY, MID-CON FREIGHT SYSTEMS, INC., H & H ENTERPRISES, INC., d/b/a S & M CARTAGE, INC., ECONOMY TRANSPORT, INC., MASON & DIXON LINES, INC., ROMEO EXPEDITORS, INC., WESTLAKE TRANSPORTATION, INC., VANDERKOOI CARRIERS, INC., GERRIG'S TRUCKING & LEASING, INC. and BESTWAY EXPRESS, INC., individually and on behalf of all others similarly situated,

Petitioners,

v.

MICHIGAN PUBLIC SERVICE COMMISSION, MICHIGAN DEPARTMENT OF TREASURY, MICHIGAN DEPARTMENT OF COMMERCE, AND THE STATE OF MICHIGAN,

Respondents.

On Petition For A Writ Of Certiorari To The Michigan Court Of Appeals

PETITIONERS' SUPPLEMENTAL BRIEF IN RESPONSE TO BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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PETITIONERS' SUPPLEMENTAL BRIEF IN RESPONSE TO BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

A. The Implicated Michigan Intrastate Fee Is A Fee Charged To Engage In Intrastate Transportation.

The Brief of the *amicus curiae* United States posits, at p. 18, that "the mere levying of a fee is not 'related to a price, route, or service of any motor carrier' for purposes of Section 601" of the Federal Aviation Administration Authorization Act of 1994 (F4A), Pub. L. No. 103-305, 108 Stat. 1605. The United States submission ignores the fact that this is not "any tax or fee" but a fee directed particularly to the ability of a motor carrier to conduct intrastate transportation in Michigan. It is a fee the payment of which is a condition precedent to the operation of intrastate truck transportation in Michigan and is the very same fee which was employed to support the economic regulation, the foundational purpose of the Michigan Motor Carrier Act (MMCA), MCL 475.1, *et seq.*, as enacted in 1933. That is why the continued assessment of this intrastate regulatory fee on all carriers conducting intrastate hauls, virtually all of which also conduct interstate transportation under the economically deregulated federal regime, transgresses the "broad and important" preemptive purposes of Section 601 as supported by *Morales v. Trans-World Airlines, Inc.*, 504 U.S. 374, 112 S. Ct. 2031, 119 L.Ed.2d 157 (1992).

B. The Michigan Intrastate Regulatory Fee Constitutes A Burden On Interstate Commerce For All Carriers.

The Brief of the United States as *amicus curiae* acknowledges, at p. 12, that the intrastate decal fee imposed at MCL 478.2(1) "affects interstate commerce." Again, virtually all carriers operating in Michigan intrastate commerce conduct interstate operations as well, given the economically deregulated federal structure contained in the ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803. In fact, Section 601(a)(1), when enacted, set forth specific congressional findings that:

> (1) The regulation of intrastate transportation of property by the states has –
>
> (A) Imposed an unreasonable burden on interstate commerce;
>
> (B) Impeded the free flow of trade, traffic and transportation of interstate commerce; and
>
> (C) Placed an unreasonable cost on the American consumers . . .

108 Stat. 1605. As detailed with specificity in the Conference Report accompanying the F4A, the myriad and complex state-by-state regulation of intrastate truck operations had caused profound "inefficiencies, increased costs, reduction of competition, [and] inhibition of innovation and technology." H.R. Conf. Rep. No. 677, 103rd Cong., 2d Sess. 87 (1994). Included among those increased costs were regulatory fees, such as the implicated Michigan intrastate fee, charged solely for the privilege of moving a single intrastate shipment with a power unit in a carrier's fleet.

The Brief of *amicus curiae* United States notes, at p. 17, that:

> Indeed, Congress's determination in the SSRS that a fee exceeding $10 for interstate hauls would unduly burden interstate commerce suggests that a charge ten times that amount for 'topping off' an interstate load warrants review by the Court.

Likewise, the disparity between the Michigan intrastate fee and the SSRS fee leads to the same conclusion for all carriers. The regulatory function of the MPSC for an existing intrastate carrier is limited to the supervision of insurance filings in the same manner as is done for an SSRS interstate carrier, plus those duties attendant to the collection of the challenged annual intrastate fee of $100 per power unit. The imposition of that fee in and of itself constitutes a continued unreasonable burden on interstate commerce in violation of Section 601. The assessment of that fee means that Michigan has never leveled the playing field for air and ground carriers, although that was a primary motivation of Congress in the initial passage of the preemption. This action by Michigan is a direct affront to the Commerce Clause and thereby warrants this Court's review.

C. Petitioners Developed Below That The Intrastate Fee Is Unrelated To A Remaining Permissible Regulatory Purpose.

The Brief of the United States also concedes that the fee might fail if it "substantially exceeded the amount Michigan required to administer lawful [non-prempted] programs." (U.S. *amicus curiae* Brief, p. 19). Of course, California attempted to continue the imposition of motor

carrier fees on the air carrier Federal Express Corporation, even after such economic regulation was held preempted in that case, the precursor to the F4A preemption. See *Federal Express Corporation v. California Public Utilities Commission*, 936 F.2d 1075 (9th Cir. 1991), *cert. denied*, 504 U.S. 979, 112 S. Ct. 2956, 119 L.Ed.2d 578 (1992), *on remand*, 1993 W.L. 399380 (N.D. Cal. 1993) (unpublished). On remand there, the court enjoined the imposition of motor carrier regulatory fees against air carrier Federal Express Corporation, although the State argued that the fees were imposed for non-preempted safety purposes. The court stated there that the fee "cannot be said to harmonize with the Deregulation Act by supporting an isolated class of acceptable regulation." *Id.* at *7.

Here, Petitioners did present evidence to the Court below that, of the over $63 million generated by the MMCA's fee provisions for Michigan fiscal years 1982-1983 through 1994-1995, only 27% had been utilized for direct MPSC regulatory purposes. "Motor Carrier Fee Revenue and Expenditures," *Michigan Senate Fiscal Agency Memorandum* (October 24, 1994), p. 4, submitted below with Plaintiffs' Response to Defendants' Motion for Summary Disposition. The same continued after the F4A preemption took effect, with only three individuals on the MPSC staff currently assigned to the "safety and complaints" function. This challenged intrastate fee is guilty of much more than association with preempted purposes. (U.S. *amicus curiae* Brief, p. 19). It represents the very burden on interstate commerce that Congress intended to end. The intrastate fee is in direct contravention of the preemption enacted by Section 601.

CONCLUSION

As in the other two Petitions for Writ of Certiorari filed with this Court in No. 03-1234 and No. 03-1230, the Petition for Writ of Certiorari in No. 03-1250 should be granted because of the significance of the questions involved in this direct state challenge to federal preemption.

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No. 03-1230, 03-1234, and 03-1250

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In the Supreme Court of the United States

AMERICAN TRUCKING ASSOCIATIONS, INC., and USF HOLLAND, INC., *Petitioners,*
v.
MICHIGAN PUBLIC SERVICE COMMISSION, ET AL.

MID-CON FREIGHT SYSTEMS, INC ET AL, *Petitioners*
v.
MICHIGAN PUBLIC SERVICE COMMISSION, ET AL.

TROY CAB, INC, ET AL, *Petitioners*
v.
MICHIGAN PUBLIC SERVICE COMMISSION, ET AL.

On Petitions For Writs of Certiorari To The Michigan Court of Appeals

RESPONDENTS' SUPPLEMENTAL BRIEF IN RESPONSE TO BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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On June 7, 2004, this Court invited the U.S. Solicitor General to file a brief expressing the views of the United States. On December 17, 2004, the United States filed its brief as amicus curiae. This supplemental brief responds to the Brief of the United States.

INTRODUCTION

The most significant aspect in these cases is the almost total absence of facts to support the Petitioners' claims. Despite having numerous opportunities to present facts to the trial court the Petitioners failed to do so. Thus, following the filing of motions for summary dispositions, the Petitioners' lawsuits were dismissed in accordance with the Michigan Court Rules. The Michigan Court of Appeals below made repeated references to the Petitioners' failure to develop a factual record.

Despite Petitioners' failure to develop a factual record, the United States, as amicus curiae, argues that certiorari should be granted in two cases (Case Nos. 03-1230 and 03-1234) and at one point even suggests that this Court decide the law and consider remanding the matter back to the Michigan courts for the development of a factual record. This clearly is placing the cart before the horse. Moreover, it effectively nullifies the requirement under the Michigan Court Rules, that a litigant, when challenged, has the obligation to set forth facts that supports its claims. Because of the lack of an adequate factual record and because of a lack of a meaningful conflict between the Michigan Court of Appeals' decision and a decision of another state court or a United States Court of Appeals, certiorari should be denied in all three cases.

A. Case No. 03-1230

The brief for the United States, despite its recommendation to the contrary, confirms that the petition in 03-1230 does not warrant this Court's review. In footnote 11, appearing on page 17 of its brief, the United States candidly admits that the record fails to show "the extent" to which the Michigan fee "actually deters

out-of-state carriers from competing with intrastate hauls" or "the extent" to which the fee "otherwise affects out-of-state carriers disproportionately or burdens interstate commerce." The footnote then concludes, saying:

> Accordingly, if the Court grants review in No. 03-1230 and articulates a general framework for analyzing fees as the one imposed by Section 478.2(1) under the Commerce Clause, the Court may find it appropriate then to remand this case to the Michigan Courts for application of that framework, including the development of any further factual record that may be necessary.

In short, the United States is asking this Court to issue an advisory opinion on the controlling law in the absence of facts supporting the Petitioners' claims.

There are problems with this approach, however. First, while the Court may attempt to anticipate and decide all aspects presented with this claim, subsequent remand proceedings may very well demonstrate that a critical question was not addressed, perhaps necessitating further review by this Court. In short, because the facts have not been fully developed, No. 03-1230 is not suitable for review. Second, such an approach effectively nullifies Michigan Court Rule (MCR) 2.116(C)(10), that provides that summary disposition is properly granted against a party when that party fails to present evidence to support its claims. As the Respondents noted in their Brief in Opposition the Michigan Court of Appeals determined that the Petitioners' claim was a "matter of pure speculation" and affirmed the trial court's grant of summary disposition against Petitioners. Were this Court to grant certiorari in the manner suggested by the United States, Petitioners would effectively be permitted to evade MCR 2.116(C)(10), without the wisdom or basis of that court rule ever being addressed.

Finally, the claim by the United States that the Michigan Court of Appeals' decision brings it into conflict with the highest courts of three States is misplaced. As the Respondents noted and explained in their Brief in Opposition the charges that were assessed in those cases bear little similarity to and were of an entirely different character than the fee challenged here. Moreover, it is clear that in each of those cases the challenges involved a more fully developed factual record than presented here. Indeed in *American Trucking Ass'n v New Jersey*, 852 A2d 142, 146 (2004), the New Jersey Supreme Court specifically noted that in 2000 it had issued an order [752 A2d 1286 (2000)] remanding the case back to the trial court due to the "need for a well-developed factual record before deciding the ultimate constitutional issues." The need for a well-developed factual record to support Petitioners' claims in this case is no less than in the case before the New Jersey Supreme Court. Here, however, the Petitioners waived that opportunity by failing to present facts to the trial court when it was required to do so under the Michigan Court Rules. Eleventh-hour attempts to resuscitate Petitioners' claim without the evidence to support it do not warrant the granting of certiorari.

B. Case No. 03-1234

The Petitioners in No. 03-1234 likewise failed to present evidence to support their claims when required to do so by the Michigan Court Rules. Instead their challenge is based on erroneous, speculative, and exaggerated claims as fully detailed in the Respondents' Brief in Opposition. The United States' brief fares no better in that it overlooks the fact that the fee charged by Michigan Compiled Laws (MCL) 478.2(2) is a regulatory fee that applies only to those interstate motor vehicles that are base-plated in Michigan. The failure to recognize this critical distinction reflects a fundamental misunderstanding of the Michigan law.

When discussing whether the Single State Registration System (SSRS) preempts the $100 fee imposed by Michigan under MCL 478.2(2), the United States says, "The question here

is not whether a State may impose *any* taxes or fees on motor carriers; instead, the question is whether it may impose fees covered by the SSRS in excess of the amounts permitted by the SSRS." Brief for the United States, p 9. (Emphasis in original). Yet, when quoting from the SSRS, 49 USC § 14504(c)(2)(C), the United States omits important controlling language. This statute states, "The charging or collection of any fee under this section that is not in accordance with the fee system *established under subparagraph (B)(iv) of this paragraph* shall be deemed to be a burden on interstate commerce." (Language omitted by the United States is in italics).

Subparagraph (B)(iv) of 49 USC § 14504 states:

> (iv) [The standards of the Secretary] shall establish a fee system for the filing of proof of insurance as provided under subparagraph (A)(ii) of this paragraph that –
>
> > (I) is based on the number of commercial motor vehicles the carrier operates in a State and on the number of States in which the carrier operates;
> >
> > (II) minimizes the costs of complying with the registration system; and
> >
> > (III) results in a fee for each participating State that is equal to the fee, not to exceed $10 per vehicle, that such State collected or charged as of November 15, 1991; and . . . .

It is clear from this unambiguous language that the reliance by the United States on 49 USC § 14504 is misplaced. The reference to "the charging or collection of any fee under this section that is not in accordance with the fee system * * * shall be deemed to be a burden on interstate commerce" relates to fees for filing interstate motor carrier's proof of insurance, not a regulatory fee that includes safety reviews, investigations and roadside enforcement by Michigan State Police. See Affidavit of Thomas R. Lonergan, ¶¶ 16, 23-25, (Respondents' Brief in Opposition, Case No. 03-1234, Res. App. pp 10b, 14b-16b);

Affidavit of Captain Timothy J. Yungfer, ¶¶ 2-12 (Respondents' Brief in Opposition, Case No. 03-1234, Resp. App. pp 30b-32b).

SSRS compliance can be found under MCL 478.7, mandating a $10.00 maximum fee for the filing of an interstate motor carrier proof of insurance and Interstate Commerce Commission (ICC) permit. To help defray the costs of safety regulation and enforcement on Michigan highways, MCL 478.2(2) imposes a $100 fee on vehicles that are issued Michigan license plates. Michigan does not collect the $100 fee from interstate motor carriers that are not base-plated in Michigan.

In support of its argument, the United States cites *State Ex Rel Sammons Trucking, Inc v Boedecker*, 158 Mont 397; 492 P2d 919 (1972). In that case, the Montana Public Commission registered all interstate carriers under the state statute. The Court held that the federal bingo card system, including regulations promulgated by the ICC, was controlling over contrary state law provisions. In this case, there is no conflict between federal and state law. Unlike MCL 478.2(2), the Montana fee specifically related to the issuance of the state certificate to all motor carriers. The regulatory fee under MCL 478.2(2) is not a fee charged to allow vehicles to cross into the state territory but rather the fees are only imposed on Michigan-plated carriers to cover the cost of safety regulations.

C. Case No. 03-1250

The Respondents agree with the United States that the Petition in No. 03-1250 does not warrant certiorari.

CONCLUSION

The failure of the Petitioners in 03-1230 and 03-1234 to present facts to support their claims when required to do so under the Michigan Court Rules justified the dismissal of those claims by the trial court. As such, they are not suitable for review by this Court.

Respectfully submitted

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